

In The

Supreme Court of the United States

Supreme Court U.S.  
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October Term, 1979

No. 79-160

EUGENE W. CONNELLY,

*Petitioner.*

vs.

COMMERCIAL TRADING CO., INC.,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION - FIRST DEPARTMENT**

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## TABLE OF CONTENTS

	<i>Page</i>
Opinion Below .....	2
Jurisdiction .....	2
Questions Presented .....	2
Statutory Provisions Involved .....	2
Statement of the Case .....	3
Preface .....	3
Background .....	8
Proceeds .....	20
<i>The Philadelphia Action American v. Ideal Shoe Co., U.S. District Court for Ea. Pa. — Civil Action No. 71- 856 .....</i>	21
Perjury Papers .....	23
Summary Judgment .....	24
Trial Court's "Findings of Fact and Conclusions of Law".	25
Trial Court's Decision .....	26
The "Affirmation" of the Appellate Division .....	29
Respondent's Motion For Discontinuance .....	30
The Uniform Commercial Code .....	32

*Contents**Page*

Lawsuits Which Resulted From This Infamous (1968)	
Action .....	35
Reasons For Granting the Writ .....	38
Trial .....	38
Uniform Commercial Code .....	40
Conclusion .....	41

**TABLE OF CITATIONS****Cases Cited:**

Citizens Valley Bank v. Pacific Materials Co., Or.	503 P.2d
491 .....	7
Gould v. Pollock, 68 Misc. 2d	670, aff'd, 71 Misc. 2d
344 ...	24
Harry Ohringer Inc. v. Kass, 28 A.D.	2d 1117 .....
Jerome v. Lewis, 32 A.D.	2d 648 .....
Kohlmann v. City of New York, 184 N.Y.S.	2d 357, 8 A.D.
2d 598 .....	39
Levitz v. Robbins Music Corp., 17 A.D.	2d 801 .....
Progressive Co. v. Mt. Vernon Clock Corp., 5 A.D.	2d
166 .....	25, 39
Public Service v. McGrath, 56 A.D.	2d 812 .....
	29

*Contents**Page*

Rosemont Enterprises, Inc. v. Irving, 49 A.D.	2d 445 .....
Salzman v. Sakofsky, 89 N.Y.S.	2d 39 .....
<b>Statutes Cited:</b>	
28 U.S.C. §1257(3) .....	2
UCC (1972) Official Text, General Comment, p.	xvii .....
UCC 2-201(1) .....	40
UCC 3-104(2)(d) .....	21
UCC 9-105(d) .....	7
UCC 9-106 .....	35
UCC 9-203 .....	33, 40
UCC 9-204 .....	4, 5
UCC 9-305 .....	4, 5
UCC 9-306 .....	34
UCC 9-306(3) .....	34
UCC 9-309 .....	40
UCC 9-318 .....	6, 33

*Contents**Page***Other Authorities Cited:**

The International Chamber of Commerce, Brochure No. 222 .....	40
Handbook of the Law Under the Uniform Commercial Code, (Hornbook Series, White and Summers, West Pub.) Ch. 23-4, p. 791 .....	6
Dillavous and Howard, Principles of Business Law, (8th Edition, Prentice Hall) Ch. 27, 3-139, p. 399 .....	7

**APPENDIX**

Opinions in the Lower Courts .....	1a
Trial Court's "Findings of Fact and Conclusions of Law" .....	2a
The "Non-Order" Memorandum Decision of Judge Rosenberg .....	7a
Order of Judge Grossman Denying Summary Judgment to Respondent .....	10a
Order of Judge Grossman Granting Motion for Preference to Petitioner .....	12a
Complaint .....	14a
Statutes Involved .....	22a

In The

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No.

COMMERCIAL TRADING CO., INC.,

*Respondent,*

v.s.

AMERICAN EAST INDIA CORPORATION and EUGENE W. CONNELLY,

*Petitioners.*


---

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION — FIRST DEPARTMENT**


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The petitioners, American East India Corporation and Eugene W. Connelly, proceeding individually, respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, entered in the above entitled case on November 21, 1978.

## **OPINION BELOW**

The findings of fact and conclusions of law of the trial court, Part 18, Supreme Court of the State of New York, New York County appears in the Appendix hereto.

The decision of the trial court was affirmed by the Appellate Division without opinion.

Subsequent motions for leave to appeal to the Court of Appeals were denied without opinion.

## **JURISDICTION**

The final denial of the New York State Court of Appeals was entered May 3, 1979. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## **QUESTIONS PRESENTED**

Whether the petitioners are entitled to be heard at trial on the facts and law of this case.

## **STATUTORY PROVISIONS INVOLVED**

The relevant statutory provision involved in this case is the Uniform Commercial Code which applicable sections are set forth in the Appendix, *infra*.

## **STATEMENT OF THE CASE**

### **Preface**

Respondent Commercial Trading Co., Inc. ("Commercial") is a commercial financing factor. American East India Corporation ("American") was an importer of shoes. Eugene W. Connelly ("Connelly") was the president of American from activation (1955) through 1974. On October 17, 1974, all rights of American in this action were assigned to Connelly. On April 1, 1976, Connelly was added as party defendant. Walker Trading Corporation ("Walker"), from December 1967 onwards, was a sales agent of American. Prior to December 1967, Walker was a shoe importer financed by Commercial.

In December 1967, sales agent Walker assigned to American four contracts previously entered into with shoe manufacturers in Taiwan, Japan and Hong Kong. American established letters of credit through their bankers in favor of the shoe manufacturers. American imported the shoes and delivered them to thirty-seven customers to create accounts receivable of \$163,072.02, of which the two largest were C.R. Anthony Co., ("Anthony") (\$66,363.11), and the Ideal Shoe Co. ("Ideal") (\$27,542.40).

By summons and complaint (Appendix, *infra*, 14a), Commercial initiated this instant action in April 1968, alleging (a) that from their former association, Walker was in debt to Commercial in an amount of \$310,000, (b) that Walker owned the goods imported, and (c) because of previous filings under the Uniform Commercial Code, Commercial had a security interest in the proceeds superior to American's interests. Hereinafter, the lawsuit will be referred to as "New York Action No. 1".

Respondent Commercial had no standing to initiate the action. Respondent Commercial never had a security interest in the proceeds.

Under the Uniform Commercial Code, petitioner American's protection was total, absolute and superior.

Respondent Commercial *did* have properly filed Walker/Commercial Accounts Receivable Security Agreements (see Appendix, 14a, par. 5) but neither Walker nor respondent Commercial held a single document of title.

American held every document of title. In a related case (see p. 21, *infra*) a court was to find:

"Summarizing, all the documents involved in the transaction indicated American as the importer for its own account." (400 F. Supp. 153).

That decision referred to the single *Ideal* account receivable. That *Ideal* receivable was one of the 37 accounts receivable at issue in this instant action. All 37 accounts receivable were developed from one series of letters of credit, one series of shipments from manufacturer's contracts assigned to American by sales agent Walker.

The complaint in this action (Appendix, *infra*, 14a) demanded a single "declaratory judgment" as to the "ownership of said accounts receivable" as a single unit (Appendix, 18a, par. 15). There was no difference between *Ideal* and the other 36, other than the fact that *Ideal* made a secret deal with respondent Commercial to discount American's invoices which forced American's independent action.

The 1975 finding (400 F. Supp. 153), carried back to the 1968 complaint, would hold, conclusively, under the Uniform Commercial Code, UCC 9-203, that respondent Commercial had no standing to initiate this instant action and, under UCC 9-204, that at no time did respondent Commercial have a security interest in the proceeds.

#### "UCC 9-203. Enforceability of Security Interests.

(1) . . . a security interest is not enforceable against the debtor or *third parties* [emphasis added] unless:

- (a) the collateral is in the possession of the secured party; or
- (b) the debtor has signed a security agreement which contains a description of the collateral . . ."

#### "UCC 9-204. When Security Interest Attaches.

(1) A security interest cannot attach until there is agreement that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place . . ."

Legal textbooks confirm, explicitly, that under UCC 9-203 and 9-204, Commercial had neither (a) standing to initiate the action against American, nor (b) a security interest to maintain the action:

"Two parties may have an agreement for security under 9-204(1) and they may reduce it to writing to the extent necessary to comply with 9-203(1)(b). Even so, the security interest they intend to create will not come into being until two additional events occur: the debtor *must* acquire rights in the collateral, and the secured party must give value. When these events occur, the security interest will 'attach' under 9-204(1), and *not until it thus 'attaches' to specific*

*collateral can the interest come into being.*" (Emphasis added.) *Handbook of the Law Under the Uniform Commercial Code*, (Hornbook Series, White and Summers, West. Pub.) Ch. 23-4, p. 791.

Every document of title to the goods was negotiated to petitioner American by their bankers, and in that same related case, *supra*, the court found:

"In this case, the documents required under the letter of credit were invoices, a customs invoice 5523 — material breakdown, and ocean bill of lading with notification to American.

On or about January 24, 1968, these documents were delivered to American by Bank of America . . ." (400 F. Supp. 151).

Again, respondent Commercial *did* have their filings, *but* petitioner American had total protection under the Uniform Commercial Code, inferior to nothing.

"UCC 9-309. Protection of Purchasers of Instruments and Documents.

*Nothing in this Article limits the rights of . . . a holder to whom a negotiable document of title has been duly negotiated and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this Article does not constitute notice of the security interest to such holders or purchasers.*" (Emphasis added.)

Legal textbooks confirm the protection of "possession" over "filing":

"The possession of the collateral by the secured party gives notice of his security interest — hence no public filing is required.

Possession is the required method of perfection of a security interest in instruments and is the optional method in the case of collateral consisting of goods, negotiable documents of title and chattel paper. However, *possession is the only method whereby complete protection in documents and chattel paper can be obtained* since: (1) the rights of holders to whom a document has been negotiated by the debtor will prevail over the secured party, *even though there has been a filing.*" (Emphasis added.) Dillavou and Howard, *Principles of Business Law*, (8th Edition, Prentice Hall) Ch. 27 3-139, p. 399.

The strong priority of "possession" over "filing", and particularly the absolute protection of UCC 9-309, was evident in *Citizens Valley Bank v. Pacific Materials Co.*, Or. 503 P.2d 491. A promissory note [UCC 3-104(2)(d)] had been negotiated to defendant Pacific. Like Commercial in this instant action, the plaintiff Citizens Bank claimed priority because of an earlier "filing." Like American, herein, defendant Pacific claimed priority because of "possession." The court held for the defendant, ruling:

"The defendant counters that ORS 79-3090 does 'otherwise provide' and we agree.

ORS 79.3090 states:

'Nothing in ORS 79.1010 to 79.5070 (Article 9) (added) limits the rights of a holder in due course of a negotiable instrument or a holder to whom a

negotiable document of title has been duly negotiated as provided in ORS 77.5010, or a bona fide purchaser of a security as provided in ORS 78.3010 and such holders or purchasers take priority over an earlier security interest even though perfected . . . ."

We have found no precedents from other jurisdictions or any statements by the writers precisely on this issue. The wording of the statute, however, seems clear: '(S)uch holders or purchasers take priority over an earlier security interest even though perfected.

Affirmed."

This action should have ended, summarily, in April 1968.

#### **Background**

Instead, petitioner American's law firm, in total confusion in the Uniform Commercial Code, "counseled" that respondent Commercial's secured interest was superior because Commercial had "filed", and American had not. Counsel recommended that American "settle" (even though respondent Commercial had not put up a penny to import the goods). Connelly, as president of American, refused. The following is a capsulized summation of the past tragic eleven years that has gotten us to this point and date.

#### **1967**

Nov. 17      Commercial established final letter of credit (L/C 69401) to end the four-year financing of Walker imports (1964-67).

- |             |  |
|-------------|--|
| Dec. 18     | American hired Walker as sales agent.  |
| Dec. 20     | Commercial made final bank acceptance (\$4,682.13) to end financing.   |
| <b>1968</b> |  |
| Jan.        | Commercial took over all Walker accounts payable, to pay bills, and close out the account.   |
| Feb. 5      | With knowledge and cooperation of Commercial, William Lynn ("Lynn") president of Walker, incorporated new company (Walker International Corporation) with new financing factor (A.I.C. Financial) one of whose officers was former Commercial employee.  |
| Feb. 14     | Commercial learned of American's imports ( <i>supra</i> , bottom p. 3). Commercial could not check with Lynn (out of country) but, in the belief Lynn had obtained temporary financing from American during interim period of Commercial dropping the Walker account (December 1967) and A.I.C. Financial picking it up (February 1968), Commercial sent telegrams and letters to all known customers of Walker, threatening them with having to make double payment if they paid any money against goods received from Walker to any party other than Commercial. |
| Feb. 28     | Lynn returned from Far East. Learned of Commercial's telegrams and letters from customer (C.R. Anthony). Informed American, for first time, about Commercial.  |
| Mar. 1      | Commercial paid Lynn \$1,000.  |

Apr. 14 Commercial initiated this instant action.

May 20 Commercial paid William Lynn, \$500.

May 22 Commercial conducted deposition of Lynn.

Aug. 1 Commercial paid Lynn \$2,000.

**1969**

Jan. 15 Commercial continued Lynn deposition.

Mar. 7 Lynn deposition.

Mar. 19 Lynn deposition.

May 7 Lynn deposition.

May 22 Lynn deposition.

May 29 Parties agreed to place two largest accounts (Anthony and Ideal) *supra*, p. 3) in bank escrow account subject to withdrawal upon final judgment or order of court. Anthony money paid into account, but when Ideal attempted to discount payment, Connelly refused to permit money into the account.

June 4 Commercial continued Lynn deposition.

June 10 Lynn deposition.

**1970**

Jan. 29 Lynn deposition.

Feb. 12 Lynn deposition.

Feb. 12 Ideal paid Commercial \$24,000, discounting American's invoices by 13%, and received indemnification in event American sued Ideal.

Mar. 11 Commercial conducted deposition of Connelly.

Mar. 26 Connelly deposition.

June 11 Connelly deposition.

July 2 Connelly deposition. For first time, Connelly learned of Ideal's secret payment to Commercial (*supra*, Feb. 12, 1970).

**1971**

Apr. 8 American initiated action against Ideal (Referred to as the "The Philadelphia Action" (more *infra*, p. 21).

June 3 Commercial conducted deposition of Henry J. Baccash ("Baccash") American's controller.

June 10 Baccash deposition.

Sept. 13 American sued Commercial for \$1.5 million each in three causes of action — fraud, inducing breach of contract and conversion (referred to as "New York Action No. 2").

**1972**

Feb. 8 American's attorney in Philadelphia handling the Philadelphia Action requested from American's New York attorney all depositions held in New York Action.

Feb. 9  
and 16

American's attorney finally held first, and only, deposition in this case, that of Gerald Grossman ("Grossman"), vice president and general counsel of respondent Commercial. Grossman told a story, later repeated almost word for word in testifying at the Philadelphia Action trial, that Commercial financed Walker from 1964 to July 1967; that in July 1967 Walker applied for two letters of credit totalling \$54,000; that because Walker was heavily in debt to Commercial, Commercial refused to establish the letters of credit during the period July through December 1967, unless Walker put up \$27,000 "margin" to support the credits, which Walker could not, and did not, do. (400 F. Supp. 149).

Dec. 8

Respondent Commercial moved for summary judgment:

"... on the grounds that there is no defense to such cause of action and that the same has been established sufficiently to warrant the Court as a matter of law in directing judgment in favor of plaintiff."

American's law firm conceded the law, but defeated the motion by convincing the court that there were two factual issues for trial (both subsequently proven in plaintiff's favor).

1973

March  
Term

Respondent Commercial appealed summary judgment denial to Appellate Division, First Department. Lower Court was affirmed.

May 15

Trial in Philadelphia Action started; seven (7) days testimony and argument over a 46-day period, through June 29, 1973. Decision reserved for more than two years and rendered July 16, 1975 (more, *infra*, p. 21).

June  
and  
onwards

American made independent study of law and Walker/Commercial financing association from 1964 through December 1967.

Nov. 1

With knowledge of attorneys, Connelly obtained opinion from another law firm. Was told that action could be dismissed by summary judgment under UCC 9-309 (*supra*, p. 6). American's law firm refused to move.

1974

May

Respondent Commercial's attorney replaced by Weil, Gotshal & Manges ("Weil Gotshal").

July 16

Connelly, for American, completed year-long study, prepared and had copies delivered to attorney and Grossman of Commercial, a document intended for the New York County District Attorney, "In Support of a Summons For Perjury Against Gerald Grossman, V.P., Commercial Trading Co., Inc.", (referred to as "Perjury Papers") detailing seventeen (17) perjured statements of Grossman at his deposition (*supra*, p. 12) and Philadelphia Action trial (*infra*, p. 21).

July 18

American's attorneys advised they were withdrawing from case. Result of association: In 1968 made quick decision, respondent was correct on

law, so held one deposition in New York Action No. 1; no depositions in New York Action No 2; made no effort to get either action to trial — received legal fees, \$81,535.12. Another law firm was hired (September 1st).

Oct. 17 American assigned to Connelly all interests in the two New York Actions and the Philadelphia Action.

Nov. 24 New York Action No. 1 — American and Commercial, moved and cross-moved for summary judgment (both denied).

New York Action No. 2 — Commercial moved for summary judgment dismissal (statute of limitations) (granted).

Perjury Papers — Grossman *et al.* initiated action against Connelly *et al.* (\$20,000,000) (more *infra*, p. 23).

Dec. 11 American dropped second law firm. Three month's legal fees, \$20,312.50 (retainer — \$15,000; services — \$5,312.50). Third law firm hired.

#### 1975

July 16 Decision rendered in Philadelphia action (*infra*, p. 21).

#### 1976

Jan. 31 Respondent Commercial moved for summary judgment on Anthony escrowed account receivable (*supra*, May 29, 1969, p. 10), exhibited Philadelphia Action decision and claimed collateral estoppel and *res judicata*.

American opposed, stressing (a) lawsuit was in 8th year and trial date was only three weeks away (February 23, 1976) and (b) exhibited documented proof from the Perjury Papers to expose the Grossman perjury which gained Commercial the favorable decision in the Philadelphia Action.

Feb. 20 After three law firms over an eight-year period had failed to get this action to trial, and in belief it never would get to trial, through efforts of attorneys, Connelly moved to be substituted as the party of interest, replacing American.

April 1 Connelly substitution motion granted "to extent of adding Connelly as party defendant."

Commercial's January 31st motion for summary judgment granted but signing of order held pending submission of additional affidavits, and never signed into order (Appendix, *infra*, 7a) (more, *infra*, p. 24).

#### 1977

Nov. 18 Petitioner Connelly moved for trial by preference (granted).

#### 1978

Jan. 8 Over ten-year period, not one attorney informed petitioners that the answer in the action did not contain any counterclaims or requests for affirmative relief of any type.

Prior to assignment to a Trial Part, petitioner Connelly moved for an order to permit an amended answer containing a counterclaim (denied).

Feb. 21 Case assigned to Trial Part 18, and heard over three days (more, *infra*, p. 26).

April 24 Final judgment entered, awarding 77.2% of proceeds to petitioner, 22.8% to respondent.

**November Term** Petitioners appealed to Appellate Division, First Department of the New York State Supreme Court limiting the appeal strictly to the law. The "Questions Involved" stated, in toto:

"the questions involved on this appeal are:

1. Did the plaintiff-respondent have standing to initiate this action in 1968?

The Uniform Commercial Code says they did not!

2. Does the plaintiff-respondent have a secured claim on any proceeds at issue in this action?

The Uniform Commercial Code says they do not!"

Petitioners "Argument" held strictly to the law, and the "Questions Involved":

1. Re "standing". Petitioners' Appendix included every document of title, all in petitioners' name. As, at no time, did the respondent, or

any other party possess the documents of title, UCC 9-203 was quoted to "prove" that the respondent had no standing to initiate the action (refer *supra*, p. 4).

2. Re "secured claim". Petitioners' Appendix included the letters of credit established to purchase the footwear, plus the "instrument" (bank draft) and documents of title negotiated to petitioner by the banks. UCC 9-309 was quoted to "prove" that "nothing" in the Code was superior (refer *supra*, p. 4).

Nov. 21

Lower court affirmed, without opinion.

Dec. 5

Petitioner moved for reargument in the Appellate Division, stating that:

". . . by its decision, the Court:

a. has set a precedent by which the dishonest can collect commercial-trade proceeds despite protections set up by the financial industry to thwart such attempts;

b. has set a precedent by which the dishonest can collect commercial-trade proceeds despite protections enacted by the New York State Legislature to thwart such attempts;

c. has ruled contrary to present law;

- d. has ruled contrary to prior decision;
- e. has granted an award in excess of the demands of the plaintiff's Complaint, and
- f. has permitted a gratis award to the plaintiff."

and expanded on each point.

**1979**

Jan. 11 Motion for leave to reargue denied.

Feb. 5 Petitioner moved for leave to appeal to the New York Court of Appeals requoting the law that respondent Commercial had no standing to initiate this action (UCC 9-203) and "nothing" was superior to petitioner American's "possession" of the negotiated documents of title (UCC 9-309), and expanded the petitioner's brief to expose blatant lies of three attorneys to deceive the courts:

a. Grossman, general counsel of Commercial, to gain the favorable decision in the Philadelphia Action (*infra*, p. 21).

b. Respondent Commercial's attorney to deceive the trial court that the Philadelphia Action decision should be *res judicata* in this action to prevent a trial on facts and law (*infra*, p. 23).

c. Respondent Commercial's attorney to deceive the Appellate Division to affirm the trial court (*infra*, p. 25).

Apr. 3

The laws and lies meant nothing, the motion for leave to appeal was denied; no opinion.

Apr. 23

Motion for reargument to Court of Appeals:

#### "Purpose of Instant Motion

In a system of practice of law and court decisions which relies so heavily on 'precedent' decisions, by denial of appellant's motion for leave to appeal, this Court has let stand a decision which denied to the defendants, and could to future honest defendants, the protection of New York State laws created by this State's Legislature to protect against the very type of dishonest practice perpetrated by the plaintiff, and their attorneys, to convert proceeds to which they had no honest, factual or legal right.

If the laws of this State are to be respected, and full protection of the law guaranteed to commercial interests of this State, the decisions in the lower courts must be reversed."

May 3

Motion for reargument denied, no opinion, \$20 costs.

Interspersed in the above were scores of motions; a number of additional lawsuits initiated; a referee's hearing; more than twelve postponed trial and pre-trial conference dates — all of which could have been, and should have been, avoided if the protection of the Uniform Commercial Code had been invoked in 1968 and this lawsuit dismissed aborning by summary judgment.

Of further importance to the Statement of the Case, and the possible understanding of this infamous lawsuit, might be the following:

#### **Proceeds**

Although the complaint, par. 8 (Appendix, 16a) stated the accounts receivable at issue to be "approximately \$200,000", the actual breakdown was as follows:

**\$66,363.11 C.R. Anthony Co. — One account receivable placed in escrow (*supra*, p. i0)**

**\$27,542.40 Ideal Shoe Co. — One account receivable, the subject of the Philadelphia Action (*infra*, p. 21)**

**\$68,489.96 35 miscellaneous "third person" accounts collected by Commercial (6) and American (29)**

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**\$162,395.47 — total**

***The Philadelphia Action American v. Ideal Shoe Co., U.S. District Court for Ea. Pa. — Civil Action No. 71-856***

In 1968, after receiving promise of payment, American shipped, and invoiced, to Ideal \$27,542.40 of footwear. Ideal withheld payment, and in February 1970 made secret payment (\$24,000) to Commercial in return for indemnification in event American sued. American sued in April 1971.

Trial started May 15, 1973 with seven days testimony and argument over a 46-day period, through June 29, 1973. Commercial defended for Ideal. American exhibited documents of title, and demanded payment. Commercial interjected the New York Action No. 1, and claimed a right to the proceeds because of "filing" under the Uniform Commercial Code. Grossman, general counsel for Commercial, testified and told a totally perjured story of a huge Walker to Commercial debt; of Commercial refusing to establish a \$54,000 letter of credit because of Walker's inability to put up \$27,000 "margin"; and of refusing to finance any Walker letters of credit after August 1967 (400 F. Supp. 149) (more, *infra, Perjury Papers*).

The court deferred a decision for more than two years. During the interim, Connelly, for American, made a study of the law and the Walker/Commercial financing history.

On July 16, 1975 the court awarded American \$20,471, less \$839.64 for damaged goods (\$19,631.36), plus interest. Commercial was awarded \$7,071.40, the court ruling American had converted a "contract right." It was a rather unique decision, as "contract rights" can exist only in contracts and no one from either side could exhibit a contract. Couldn't, for the simple reason that no contract existed. American had shipped their goods against a promise to pay. To be actionable, a contract must be a writing and *signed* [UCC 2-201 (1)].

- 7-28-75 American's attorney filed a motion to amend court's findings of fact, to make additional findings of fact for a new trial to the extent necessary to make such findings, to amend conclusions of law and to amend the judgment.
- 7-29-75 American's attorney served, *untimely*, a copy of the motion to amend, etc. on Commercial's attorney.
- 8-1-75 Affidavit of Eugene W. Connelly in support of plaintiff's motion to amend, etc. delivered to court's chambers.
- 8-1-75 Motion to amend, etc. denied.
- 8-14-75 Commercial filed notice of appeal to the U.S.C.A. 3rd Cir.
- 11-7-75 American moved in U.S.C.A. to dismiss appeal by Commercial "on the grounds that the appeal is frivolous."
- 11-24-75 Commercial filed "Appellant's Motion For Voluntary Dismissal of Appeal."
- 12-10-75 Court granted Commercial's motion for dismissal of appeal.
- Despite the clear record and facts of Commercial's withdrawal of their appeal, in a desperate effort to keep this instant action from going to trial on merits and law and make the Philadelphia Action decision *res judicata* in New York, a Commercial attorney told the trial judge:

"May I mention that the Philadelphia decision had been appealed to the Third Circuit, and the Third Circuit unanimously affirmed the decision of Judge Green." (T24) (400 F. Supp. 141).

To save costs, American did not appeal the 1975 *Ideal* ruling preferring to recover in this earlier 1968 action in which the *Ideal* account receivable is a vital part.

#### Perjury Papers

Connelly's post-Philadelphia Action trial discovery disclosed that Grossman had perjured himself at least 17 times at trial and the single deposition in this action. Where he had testified at trial (400 F. Supp. 149) that Commercial had refused to finance a \$54,000 letter of credit because of Walker's inability to put up \$27,000 "margin", the truth is that Commercial purchased Walker's accounts receivable, *never* refused a single Walker letter of credit for want of "margin" and where Grossman testified that *no* letters of credit were financed after "August of 1967", the truth is that seven were established totalling \$76,500 and, with overdrafts, \$157,588.10 financed against them.

Connelly prepared a paper detailing the perjury. A copy was sent to Grossman. Grossman initiated an action (details, *infra*, p. 36) to have Connelly appear for deposition "to aid Grossman . . . in bringing a cause of action against Connelly . . ." Connelly defaulted on papers intentionally in order to appear; did appear; produced 56 exhibits to substantiate the perjury accusations; was deposed on January 29, 1975. To date, no further action has been taken.

### **Summary Judgment**

There are thirty-seven (37) accounts receivable at issue in this action (see *Proceeds, supra*, p. 20).

On December 8, 1972, respondent Commercial moved for summary judgment on all thirty-seven accounts receivable. Motion denied.

On January 31, 1976, respondent Commercial moved for summary judgment on the single *Anthony* account receivable. Motion granted by memorandum decision (Appendix, 7a) but never signed into order (J. Rosenberg).

On September 9, 1977, respondent Commercial moved for summary judgment on "thirty-four (34) 'third person' accounts." Motion denied (J. Grossman).

On November 11, 1977, respondent Commercial again moved for summary judgment on "thirty-four (34) 'third person' accounts." Motion denied (J. Grossman).

Though Judge Rosenberg granted summary judgment on the single *Anthony* account receivable, he never signed his decision into an order. Judge Rosenberg retired in December 1976. This action was assigned to Judge Grossman who refused to sign the Judge Rosenberg decision into an order. (*Where no order was entered* on first judge's decision (now out of court), the second judge was not bound by the first judge's decision — see, *Gould v. Pollack*, 68 Misc. 2d 670, aff'd, 71 Misc. 2d 344.

Not only did Judge Grossman refuse to sign the Judge Rosenberg decision into an order, but in denying respondent Commercial's November 11th motion for summary judgment on the "third person" accounts, he stated:

"Plaintiff renews its cross motion for summary judgment under the principles of collateral estoppel. There is no cause of action in the complaint seeking recovery under principles of collateral estoppel and summary judgment is not available on an unpleaded claim." *Progressive Co. v. Mt. Vernon Clock Corp.*, 5 A.D. 2d 166; *Harry Ohringer Inc. v. Kass*, 28 A.D. 2d 1117.

"Furthermore, plaintiff had made a motion for summary judgment on its complaint. It cannot make successive motions for summary judgment thereon." *Jerome v. Lewis*, 32 A.D.2d 648; *Levitz v. Robbins Music Corp.*, 17 A.D.2d 801.

Plaintiff-respondent Commercial's motions for summary judgment on the single *Anthony* and 34 "third person" accounts receivable were based on the decision of Judge Green in the Philadelphia Action (400 F. Supp. 141). Despite the facts of (a) Judge Rosenberg not signing his decision into an order, and (b) the clear, unambiguous, language of Judge Grossman in denying the summary judgment motions, in a desperate effort to keep this action from trial on merits and law and have the trial court's decision affirmed, Commercial's attorney stated in his respondent's brief to the Appellate Division:

"Moreover, Judge Green's finding was adhered to without exception by Mr. Justice Rosenberg, Mr. Justice Grossman and Mdme. Justice Shainswit below."

### **Trial Court's "Findings of Fact and Conclusions of Law"**

(Appendix, *infra*, 2a).

At trial, the court gagged the petitioner's into limiting testimony to a single performance (costs to import goods) and

barred the petitioners from placing into evidence any *law* and any *exhibits* to prove a total secured interest in the proceeds at issue:

"Proceeding then with the determination of the *sole issue* (emphasis added) left to be tried, I urged Mr. Connelly to present his former company's costs in filling the Anthony account." (Appendix, *infra*, 5a).

The Findings are replete with (a) statements that are completely false, (b) statements that are completely opposite from the truth, and (c) statements of "facts" that simply never happened. The trial court did not credit the sources for the "Findings", but if the statements had been made from the witness stand, each of them could have been challenged by the defendants, and the truth brought to surface.

#### Trial Court's Decision

The trial court's Findings (Appendix, *infra*, 2a) starts:

"This decision finally puts at rest — hopefully — an inordinately complex, 10-year old, series of lawsuits."

The court did have an opportunity to put the "10-year old series of lawsuits" at rest, but failed, tragically. If the court had opened the trial with:

"Gentlemen, you have been waiting ten years to get this case to trial, have at it."

the case could have been over in ten minutes, a minute per year, or less.

"MR. CONNELLY: Your Honor, all I am saying is that my testimony in this case, if we are allowed to proceed, will be no longer than five minutes. I think I could talk for fifteen minutes and waste your time, whereas five minutes on the stand could end this whole case." (T36).

The petitioners asked to be heard on the complaint, and were refused:

"MR. CONNELLY: It is because I was granted a motion for preference for my case to be heard because there has been no order signed in this lawsuit. They brought a complaint against me. Why should they not have to take that complaint and be heard on it?" (T32).

MR. CONNELLY: I read from their complaint, paragraph 15 (Appendix, *infra*, 18a) (added) 'Because of the dispute that presently exists as aforesaid between plaintiff and defendant American with respect to the ownership of said accounts receivable and the right to receive payment thereof, a judicial determination of such dispute is desirable and necessary.' That is all I am asking for, what their complaint says." (T34).

The petitioners asked to be heard on the law, and were refused:

"MR. CONNELLY: Yes, Your Honor. During the year 1977 I sent several letters to Judge Dudley (Administrative Judge) (added). I reminded Judge Dudley that this case was on the books for nine years. I suggested to Judge Dudley that I could get this case off the books within half an hour to half a day if I could go to trial. I said the same —

THE COURT: You have had your trial, Mr. Connelly.

MR. CONNELLY: I asked for a five minute trial before Judge Rubin (Assignments Part) (added).

THE COURT: Mr. Connelly, you have had three days now. Anything else you want to say?

MR. CONNELLY: I would like to read the law in (to the record) on which I based my case.

THE COURT: No, sir. All right, gentlemen." (T197).

At the outset, the court obtained confirmation that Judge Rosenberg's memorandum decision (Appendix, *infra*, 7a) had not been signed into an order:

"THE COURT: Please proceed, counsel. One thing I want to say, there was no order entered on Judge Rosenberg's opinion, am I correct?

MR. LEMBERGER (plaintiff attorney): Correct.

THE COURT: There is no decision therefor. You will have to present to me your claim and the reasons why you believe the Philadelphia decision is res judicata. Then we will have this Defendant present to me, if I choose to follow the Philadelphia decision. Mr. Connelly will then present to me his figures on his costs, and I will do the allocating, if I decide to do it and follow the Philadelphia decision.

MR. LEMBERGER: Your Honor, may I say I am a little unprepared for this disposition." (T37).

The court then bowed to the respondent's refusal to put a single witness on the stand, refusal to put a single document in evidence. The petitioners were restricted to three days of tediously putting cost figures to import shoes on the record. The petitioners were awarded those costs, the respondent awarded the profits despite the facts (a) they had not put up a penny to earn them and (b) had no legal right to them.

Although not to the extent originally intended, the respondent's attempted conversion coup of 1968 had succeeded—because the court refused to hear the facts, and refused to hear any part of the Uniform Commercial Code which provided specific protection against the very type of commercial thievery perpetrated by the respondent.

#### The "Affirmation" of the Appellate Division

The court's failure to render an opinion raises the perplexing question: What did they affirm? By its final judgment the trial court granted respondent Commercial summary judgment.

Did they affirm that the trial court was correct in disregarding the prior opinion of Judge Rosenberg that "there is no cause of action in the complaint seeking recovery under the principles of collateral estoppel and summary judgment is not available on an unpleaded claim" (*supra*, p. 25), but that would be contrary to *Rosemont Enterprises, Inc. v. Irving*, 49 A.D. 2d 445 and *Public Service v. McGrath*, 56 A.D. 2d 812 which held that "with certain exceptions, not here relevant, a judge should not generally pass upon or review a matter already passed upon by another judge of equal authority or coordinate jurisdiction."

Possibly an opinion would have cleared up a glaring inconsistency. The court had for review, a copy of the trial transcript, and the trial court's "Requests for findings, etc." (Appendix, *infra*, 2a). Both will confirm that no respondent witness testified, no proof or exhibit of any kind was evidenced by the respondent (nor was a Respondent's Appendix submitted in the appeal) and the trial court stated, correctly, in the findings that the *sole issue* "tried" was the defendant's submission of cost figures to import footwear (*supra*, p. 25).

But, how could the court reconcile the "findings" with the final judgment which stated, in pertinent part:

"The issues in this action, which is an action for a declaratory judgment seeking to declare the respective rights of the parties with regard to the receipt of payment of certain accounts receivable having duly come on to be heard . . . on the 21st, 22nd and 23rd days of February, 1978, and the issues having been duly tried on those days . . . and the proofs of both parties having been adduced and their respective counsel having been heard. . . ?"

#### **Respondent's Motion For Discontinuance**

The trial court was consistent only in its disregard for the complaint in the action. Where the trial court disregarded the opinion of Judge Grossman that summary judgment was unavailable to the respondent in the complaint, the court also granted the respondent a motion for discontinuance completely outside the limits of the complaint.

On page 4, the Findings (Appendix, *infra*, 5a) state:

"On the subsequent trial before me, plaintiff moved to withdraw all its claims — for an all-

encompassing declaratory judgment, injunction, and compensatory damages — except that relating to a declaration of rights as to the moneys in the escrow account. I granted that motion."

That is not what the court's order (A52, Appellant's Appendix to App. Div.) says:

"The plaintiff above named having moved for an order discontinuing so much of this action: (1) as seeks declaratory relief on the first cause of action except as to the Ideal Shoe Company and C.R. Anthony Shoe Company accounts; (2) as seeks injunctive relief, etc. . .

ORDERED that so much of the above entitled action (1) as seeks declaratory relief on the first cause of action except as to the Ideal Shoe Company and C.R. Anthony Shoe Company accounts; (2) as seeks injunctive relief — etc."

Whether the motion was for the "moneys in the escrow account", as the Findings say, or the "Ideal Shoe Company and C.R. Anthony Shoe Company accounts" as the order of discontinuance says, is immaterial. The court's granting of the motion had no substance in the complaint, itself. The complaint (par. 15) asked for a "judicial determination" as to the ownership of the accounts receivable — not Ideal, or Anthony, or any of the other 35 — just, 'who owned the goods?', period! The court was bound by the complaint, and ignored it. Paragraph 15 of the complaint was read to the court (*supra*, p. 27) and ignored, leading to the granting of a motion for discontinuance for which there was no justification.

### The Uniform Commercial Code

At every stage of this lawsuit, from receipt of complaint to trial, the petitioners had total protection under the Uniform Commercial Code, stymied only by two major calamities, one at each end; the failure of their original attorneys to understand the Code, and the refusal of the trial court judge to permit the citing of the Code ("I would like to read the law on which I based my case" — "No, sir." (T37).

In December 1967, sales agent Walker assigned four footwear manufacturers contracts to American. American established documentary letters of credit in favor of the manufacturers, and imported the goods which created the accounts receivable at issue. The Uniform Commercial Code says that American had total protection from the moment the manufacturer's contracts were assigned, until ten days after American received or should have received payment from their customers.

#### 1. The assignment was protected.

##### "UCC 9-318

(1) . . . the rights of an assignee (American) are subject to:

(a) all the terms of the contract between the account debtor (manufacturer) and assignor (Walker).

(4) A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract rights to which they are parties is ineffective."

#### 2. The contract was protected prior to manufacture.

##### "UCC 9-106

'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument."

The "instrument" is the single most important document in a letter of credit transaction. It is the carrier to which all documents required by a documentary letter of credit are attached when negotiated against the letter of credit.

The demands of an "instrument" are covered in UCC 3-104 (refer Appendix, *infra*, 23a).

#### 3. The contract was protected after manufacture, prior to shipment of goods.

##### "UCC 9-106

Account means any right to payment for goods . . . which is not evidenced by an instrument."

#### 4. The contract was protected during negotiation between manufacturer's bank and American's bank.

##### "UCC 9-309

Protection of Purchasers of Instruments and Documents.

Nothing in this Article limits the rights of a holder . . . to whom a negotiable document of title has been duly negotiated . . . and such holders or purchasers take priority over an earlier security interest even though perfected. . . ."

5. American was protected when the documents of title (bills of lading) were surrendered to take possession of the footwear.

**"UCC 9-305"**

**When Possession by Secured Party Perfects Security Interest Without Filing.**

A security interest in . . . goods . . . may be perfected by the secured party's taking possession of the collateral. . . . A security interest is perfected by possession from the time possession is taken without relation back. . . ."

6. American was protected when the collateral was delivered to their buyers and invoiced to collect their proceeds.

**"UCC 9-306"**

**'Proceeds'; Secured Party's Rights on Disposition of Collateral.**

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor. . . ."

Under the Code, a "debtor" is one who "owes payment", or one who "owes other performance of the obligation" or the owner of the collateral with the obligation to complete a contract to create the ultimate "debtor," the one who "owes payment."

**"UCC 9-105 (d)"**

'Debtor' means the person who owes payment or other performance of the obligation secured. . . .

Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral. . . ."

**Lawsuits Which Resulted From This Infamous (1968) Action**

Which came first, the chicken or the egg?

In 1968, respondent Commercial initiated this action, the initial step in a plot to convert almost \$500,000.

In 1968, petitioner American's law firm had available the Uniform Commercial Code to nip that plot in the bud, but did not use it.

Regardless of which to condemn from this lawsuit, more than sixteen additional lawsuits have resulted, to date, including the following:

**Supreme Court of New York State — New York County**

*American East India Corporation v. Commercial Trading Co.*

Ind. No. 21279/71 — \$4,500,000

Basis: Fraud; inducing breach of contract; conversion.  
Disposition: Complaint dismissed, statute of limitations

*Connelly v. American East India Corporation*

Ind. No. 3202/76 — \$28,000

Basis: Breach of assignment agreement  
Disposition: Ended in mid-trial stipulation

*Connelly v. Weil, Gotshal & Manges* ("Weil Gotshal")  
Ind. No. 7903/76 — \$250,001

Basis: From May 1974, Weil Gotshal took on the representation of Commercial in New York Action No. 1. While there would seem to be some justification for a law firm to represent a known guilty defendant, there would not seem to be any justification for a law firm to represent a plaintiff engaged in a fraudulent action.

Before Weil Gotshal put a single paper into court for Commercial, they had received a copy of the Perjury Papers (*supra*, p. 23). Within two months, they had seen the 56 exhibits to support the Perjury Papers and had conducted a deposition of Connelly on the Perjury Papers.

When, on January 31, 1976 only three weeks before trial, Weil Gotshal moved for summary judgment in this action (*supra*, p. 24), and exhibited the entire 53-page memorandum decision of the Philadelphia Action (400 F. Supp. 141) knowing the decision was based on the perjury of Grossman, Connelly initiated the action against Weil Gotshal.

Noticed for: "Malpractice resulting in presentations prejudicial to administration of justice."

Disposition: Complaint dismissed for failure to state "a viable cause of action."

*Grossman et al. v. Connelly et al.*

Ind. No. 16587/74 — \$20,000,000

Noticed for: "Publication by defendants of false statements understood by third parties to accuse plaintiffs of the crime of perjury."

Disposition: Plaintiff moved (granted) for Connelly to be deposed to "aid" in preparation of complaint. Connelly deposed January 29, 1975. No complaint received to date.

*Connelly v. William Lynn et al.*

Ind. No. 13493/76 — \$43,960.68

Noticed for: "Conversion, perjury and collaboration to detriment of employer."

Disposition: Mutually agreed settlement.

*Connelly v. Commercial Trading Co.*

Ind. No. 22472/76 — \$163,304.80

Noticed for: "Release of funds" (Funds held by Commercial to credit of Walker Trading)

Disposition: Complaint dismissed, statute of limitations.

*Connelly v. Commercial Trading Co.*

Ind. No. 22473/76 — \$127,695.33

Noticed for: "Release of funds" (Funds held by Commercial to credit of Walker officers)

Disposition: Complaint dismissed, statute of limitations.

*Connelly v. Chadbourne, Parke, Whiteside & Wolff*

Ind. No. 15995/77 — \$4,519,071.40

Basis: Malpractice and negligence in failures to prosecute New York Actions Nos. 1 and 2

Disposition: Complaint dismissed, court ruling that causes of action occurred prior to October 1974 assignment of actions to Connelly.

*Connelly v. Leahy & Johnson*

Ind. No. 572/78 — \$4,515,000

Basis: Malpractice and negligence in failures to prosecute New York Actions Nos. 1 and 2

Disposition: Complaint dismissed, improper service.

*Connelly v. Commercial Trading Co.*

Ind. No. 5417/78 — \$16,750.56

Basis: Recovery of six accounts receivable discontinued from New York Action No. 1 trial, Feb. 21, 1978

Disposition: Complaint dismissed — statute of limitations and *res judicata*

*Connelly v. American East India Corp.*

Ind. No. 6482/78 — \$51,739.40

Noticed for: Release of funds held in trust.

Disposition: Awaiting trial

**United States District Court For Eastern Pennsylvania***American East India Corp. v. Ideal Shoe Co.*

("Philadelphia Action")

C/A 71-856 — \$27,542.40

(For details, see *supra*, p. 21)*Connelly v. Ideal Shoe Co.*

C/A 78-304 — \$14,142.80

Basis: UCC 9-306 (3); recovery of proceeds lost in Philadelphia Action.

Disposition: Motion to dismiss complaint on "bars of *res judicata* and the statute of limitations" granted, no opinion.*Connelly v. Wolf, Block, Schorr & Solis-Cohen*

C/A 78-2175 — \$32,000

Basis: Malpractice and negligence in prosecution of Philadelphia Action.

Disposition: Awaiting trial.

**REASONS FOR GRANTING THE WRIT****Trial**

By the opening sentence of its "Findings of fact . . ." (Appendix, *infra*, 2a):

"This decision finally puts at rest — hopefully — an inordinately complex, 10-year old, series of lawsuits,"

the trial court certainly must have realized that much more than this instant action was involved. Rather than hear the parties on the complaint, and make a strong decision, the court grasped at a straw of making an unsigned memorandum decision the "law of the case." Rather than hear facts and law, the court granted summary judgment. Rather than accept the decision of an associate judge, Justice Grossman, that "there is no cause of action in the complaint seeking recovery under principles of collateral estoppel and summary judgment" and the prior decisions in *Progressive v. Mt. Vernon Clock* and *Ohringer v. Kass* that summary judgment is not available on an unpleaded claim, the court held to the unsigned memorandum decision.

Despite gagging the petitioners to limit testimony of presenting cost figures to import footwear, and hearing no respondent witness, the court prepared a six-page "Findings of fact and conclusions of law," but gave no source for the findings. Certainly it is obvious from reading the findings that many of them came from respondent's papers filed over a ten-year period. Certainly the falsity of the Findings could have been exposed if uttered by a witness.

In 1972, respondent Commercial filed this action as an equity case, and it was calendared as such, "E-13302." In *Salzman v. Sakofsky* (89 N.Y.S. 2d 39), it was held that "In an equity case, in order to effect a disposition on the merits, findings of fact are essential in decision of court." Rather than hear facts to dispose of the case on the merits, the court shut off all facts and law by granting summary judgment.

In *Kohlmann v. City of New York* (184 N.Y.S. 2d 357; 8 A.D. 2d 598), it was held that "Parties to a trial, civil or criminal, have a right to have the case determined on the facts and law applicable thereto." While the respondent had no desire to put a witness on the stand, certainly the petitioners should have the opportunity to have this case determined on the facts and law.

### **Uniform Commercial Code**

In dollar volume, the documentary letter of credit is the largest secured transaction in the world. Millions of dollars worth are established daily. The yearly volume is in the trillions. The uniform handling and *operation* of documentary letters of credit is controlled by The International Chamber of Commerce Brochure No. 222. Every documentary letter of credit carries the statement:

"This credit is subject to the Uniform Customs and Practice For Documentary Credits (1962 Revision) International Chamber of Commerce, Brochure No. 222."

Adherence of the United States banks to those regulations became effective July 1, 1963. But those rules refer to *operation* not *protection*.

When the framers of the Uniform Commercial Code undertook their decade-long (1942-52) project, to compile Article 9, Secured Transactions, they brought in committees of "hard-headed businessmen and operating bankers." (UCC 1972 Official Text, General Comment, page xvii). Through their efforts, Article 9 gives to every party who purchases goods for resale, financed by a letter of credit, complete protection from "contract rights" (UCC 9-106) in a contract prior to manufacture on through 10 days after collection of "proceeds" of the sale [UCC 9-306 (3)].

When Governor Rockefeller signed the Uniform Commercial Code legislative bill into law in 1964, that complete protection was extended to every user of a letter of credit in New York State, including the petitioners herein.

When petitioner American established the letters of credit to create the accounts receivable at issue in this action, they had

every right to the protection of the law. When petitioner Connelly took assignment of American's interest in this action, in October 1974, he did so in the confident belief that when this case did get to trial, the courts would uphold the law. By the trial court granting summary judgment to the plaintiff-respondent, the protection of the law became a mockery. That mockery could, and should, be obliterated and the protection of the law returned to this defendant-petitioner and all future parties who look to the Uniform Commercial Code for protection.

### **CONCLUSION**

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Eugene W. Connelly  
████████ for Petitioners

**APPENDIX**

**OPINIONS IN THE LOWER COURTS**

**STATE OF NEW YORK COURT OF APPEALS**

**Motion for Leave to Appeal:**

No. 116 — February Term, 1979

Decided — April 3, 1979 — Denied; no opinion.

**Motion for Reargument:**

No. 399 — April Term, 1979

Decided — May 3, 1979 — Denied; no opinion.

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION — FIRST DEPARTMENT**

**Appeal of Trial Court Decision:**

November Term, 1978

Decided — November 21, 1978 — Order 3928 —  
Affirmed; no opinion.

**Motion for Reargument:**

December Term, 1978

Decided — January 11, 1979 — Order M-4323 —  
Denied; no opinion.

**TRIAL COURT'S "FINDING OF FACT AND CONCLUSIONS OF LAW"**

SUPREME COURT OF NEW YORK  
COUNTY OF NEW YORK

Trial Term      Part XVIII

Dated and Filed: March 21, 1978

Index No. 10534/72

COMMERCIAL TRADING COMPANY, INC.,

Plaintiff,

-against-

AMERICAN EAST INDIA CORPORATION and EUGENE W. CONNELLY,

Defendants.

SHAINSWIT, J.:

This decision finally puts at rest — hopefully — an inordinately complex, 10-year old, series of lawsuits.

The instant complaint was served in April 1968. Plaintiff Commercial Trading Co., a factoring corporation, had in essence lent money to the Walker Trading Corp. from February 1964 to July 1967, in return for a security interest in "... all present and future accounts and contract rights" of Walker. The latter's business was ordering goods from manufacturers in the Orient to fill orders it had received from American companies; plaintiff financed these purchases by taking out letters of credit

*Trial Court's "Finding of Fact and Conclusions of Law"*

on the particular transactions. The financing statement was filed on the first permissible day after enactment of the Uniform Commercial Code, and was appropriately renewed.

In connection with large orders to Walker from the Ideal Shoe Co. and C. R. Anthony Co., plaintiff Commercial asked Walker to provide additional margin (apparently because plaintiff was becoming generally — and rightly — concerned about Walker's shaky financial position). To provide this margin, Walker arranged, between September and December 1967, to assign certain purchase orders — including the Ideal and Anthony orders — to defendant American East India Corp., an export-import company. American was not informed of the arrangement between Walker and plaintiff. American took over these transactions, arranging for the financing, manufacturing, and importing. Then, in February, 1968, Commercial found out about this, and promptly notified Ideal and Anthony, *inter alia*, about its claim of priority. Ideal then paid Commercial, and Anthony's payment was placed in an escrow fund (the escrow agents are Chadbourne, Parke, Whiteside, and Wolff, and Wachtell, Lipton, Rosen and Katz).

Defendant American sued Ideal in the federal district court for the Eastern District of Pennsylvania, and plaintiff took over defense of that suit, under an indemnity arrangement with Ideal. Somewhat earlier, plaintiff Commercial had brought the instant suit against American in this Court, seeking (a) a declaratory judgment establishing its superior interest in the escrow and other accounts, (b) an injunction prohibiting defendant from attempting to collect on the various purchase orders, and (c) compensatory damages for tortious interference with its contract rights. Finally, American filed its own suit against Commercial in New York for conversion.

*Trial Court's "Finding of Fact and Conclusions of Law"*

The federal action came to trial first, and was decided in July 1975 (*American East India Corp. v. Ideal Shoe Co.*, 400 F. Supp. 141). District Judge Green there held that Commercial, the factoring company (plaintiff here, defendant in the federal case) had a claim against American, the export-import company (defendant here, plaintiff in the federal suit) for conversion of its contract rights, because its legal interest had priority; and that the measure of damages was the value of the contract before the expenditure by American. The latter was found by the federal court to have acted in good faith; as an innocent converter, it was entitled to recover its expenditures. Commercial thereupon paid American its expenses on the Ideal account, the appeal was withdrawn and the matter is now concluded.

On the basis of the federal decision, Commercial moved in this Court for summary judgment, which was granted on April 1, 1976. Mr. Justice Rosenberg held that the federal ruling constituted collateral estoppel, and that its findings of fact and conclusions of law were therefore binding on the Anthony purchase orders also, both as to liability and as to the measure of damages. He referred the determination of damages in July 1976 to Special Referee Byer. After hearings, the Referee issued an order on March 29, 1977, stating that the matter had been settled before him by division of the \$66,363.11 escrow money — \$55,000 was to go to American — and the exchange of general releases.

Sometime earlier, American had assigned its claim to its former president, Eugene Connelly, who had, on motion, been added as a party defendant to this litigation. Mr. Connelly, although a party to all the hearings and negotiations, refused to carry out the settlement by signing releases. Plaintiff chose not to pursue the settlement, and the case came back on the Court's calendar. Mr. Connelly made numerous motions, all unsuccessful; *inter alia*, he moved to amend the answer in this case by adding counterclaims and affirmative defenses; that motion was denied by Mr. Justice Rubin in January, 1978.

*Trial Court's "Finding of Fact and Conclusions of Law"*

On the subsequent trial before me, plaintiff moved to withdraw all its claims — for an all-encompassing declaratory judgment, injunction, and compensatory damages — except that relating to a declaration of rights as to the moneys in the escrow account. I granted that motion. Proceeding then with the determination of the sole issue left to be tried, I urged Mr. Connelly to present his former company's costs in filling the Anthony account. Mr. Connelly — who appeared *pro se* — then testified himself, presenting some supporting documentation. His testimony was supplemented, on the Court's request, by that of Henry Baccash, now president of the import company, and comptroller at the time of all the events in question, who appeared as a Court witness.

The actual proof of costs presented by Mr. Connelly was initially conclusory. However, once it was supplemented by Mr. Baccash's testimony, it sufficed to establish total costs of \$51,239.15. These costs consisted of the cost of the goods (shoes), financing charges, duty charges, ocean shipping and forwarding charges, and insurance. Mr. Baccash explained how he had allocated costs to the Anthony orders, and also identified his handwritten notations on the documentary proof, both establishing the allocations and stating the particular costs — all of it, he testified, placed there at the time of the transactions in 1968. He also identified various billings and statements as attributable to the Anthony orders, based on his own memory and knowledge. He was an intelligent and careful witness, and I fully credited his testimony; it more than substantiated Mr. Connelly's generalized testimony.

The evidence presented by Mr. Connelly involved 6 of the 7 Anthony purchase orders. It developed that \$10,710.00 in the escrow fund represents the seventh order; Mr. Connelly conceded that his company had refused to purchase that order, but sought to claim \$2,012.64 from the escrow fund in that

*Trial Court's "Finding of Fact and Conclusions of Law"*

connection nevertheless, on the ground that American had lent that sum to Walker, for shipping charges on the seventh order, after Commercial had declined to finance it and Walker had done its own financing. That claim is obviously outside the parameters of Mr. Justice Rosenberg's order, and in any event was wholly unsupported by documentary proof; it is therefore rejected.

The Court notes that Mr. Connelly is an unfortunate figure. The problems of this litigation have obviously caused him great emotional disturbance. Indeed, he stated to the Court that he is now retired and that this case has become the main interest in his life. Since defendant company, under his leadership, innocently lost large sums of money, compounded by a decade of litigation, his bitterness and confusion are understandable. The Court has therefore made some allowance for the limitations of his *pro se* handling of this matter.

Careful analysis of all of the testimony and documentation lead the Court to the conclusion that there is sufficient basis for the claimed cost of \$51,239.15. The balance of the \$66,363.11 in escrow may be delivered to plaintiff Commercial.

This decision constitutes the Court's findings of fact and conclusions of law.

Settle a judgment promptly, declaring the rights of the parties in connection with the foregoing.

Dated: March 21, 1978

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J.S.C.

**THE "NON-ORDER" MEMORANDUM DECISION OF  
JUDGE ROSENBERG**

SUPREME COURT : NEW YORK COUNTY

INDIVIDUAL CALENDAR : PART 6

COMMERCIAL TRADING COMPANY, INC.,

Plaintiff,

-against-

AMERICAN EAST INDIA CORPORATION,

Defendant.

INDEX NO.  
10534/72

ROSENBERG, J.:

Motion for summary judgment by the plaintiff is granted.

The decision rendered in an action brought in the U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 71-856, American East India Corporation v. Ideal Shoe Company constitutes a collateral estoppel here (References to that decision shall hereinafter read A-I, p. )

Both the plaintiff and the defendant here claimed the right to be paid by the defendant Ideal in the Pennsylvania action. In fact, Ideal made payment to the plaintiff Commercial in return for Commercial's agreement to indemnify and defend Ideal (A-I, p. 17, 20). Ideal, defended by Commercial, asserted, and the Court there accepted, that Commercial may raise the same issues as defenses as might be asserted in a suit between American and Commercial (A-I, p. 20-21).

*The "Non-Order" Memorandum Decision of Judge Rosenberg*

The Court in that decision made extensive reference to the facts and made both findings of fact and conclusions of law. A copy of the decision is incorporated herein. Because of the agreement between Commercial and Ideal, the defense conducted by Commercial and importantly the admission by that Court, without objection from American, of the interposition on behalf of Ideal of all defenses available to Commercial, a collateral estoppel was effected and the determination there made is here binding on both parties. The rules governing the application of the doctrine have been simplified and plainly enunciated:

"New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and, second, there must have been full and fair opportunity to contest the decision now said to be controlling." (*Schwartz v. Public Administrator*, 24 N Y 2d 65, 71)

In the Pennsylvania action the Court rules that American was entitled to payment in the amount invoiced Ideal ("the contract price", A-1, p. 51) less American's cost which consisted of purchase price, bank charges, duty ocean shipping and forwarding and insurance (A-1, p. 17).

The Court is aware that the Pennsylvania action involved the "contract right" on the Ideal order alone. An examination and analysis of the decision demonstrates that the findings of fact are also binding as to the Anthony purchase order. The dealings between American and its assignor included both purchase orders at the same time. The findings of fact and

*The "Non-Order" Memorandum Decision of Judge Rosenberg*

conclusions of law determined in the Pennsylvania decision therefore necessarily determine the facts and law as to both purchase orders since it was the dealing between American and its assignor which were determinative of the rights of the parties.

Since this action involves both the Ideal and Anthony purchase orders the judgment to be entered herein shall combine the proceeds and costs of the two orders in determining the amount of the judgment. The Pennsylvania decision has already determined a net amount including interest on the Ideal order. The net amount should be determinable on affidavits on the Anthony order since the components are all subject to proof by documentary evidence. Since the Anthony payment has been held in Escrow in an interest bearing account by agreement between Commercial and American, no interest shall be awarded but the interest earned in that account shall be divided pro rata between Commercial and Anthony to the division of the Anthony payment.

The Pennsylvania decision serves not only as a collateral estoppel on the issue of liability here, the decision also serves to establish the method by which damages are to be here determined. Utilizing that rationale, the parties are directed to submit additional affidavits within 20 days after publication of this decision in the New York Law Journal, supported by documentary evidence to permit the fixing of the amount to be awarded. Entry of an order is reserved pending submission of those materials.

Dated: April 1, 1976.

s/ S.R.  
J.S.C.

**ORDER OF JUDGE GROSSMAN DENYING SUMMARY  
JUDGMENT TO RESPONDENT**

SUPREME COURT : NEW YORK COUNTY

INDIVIDUAL CALENDAR : PART 6

COMMERCIAL TRADING COMPANY, INC.,

Plaintiff,

-against-

AMERICAN EAST INDIA CORPORATION and EUGENE CONNELLY,

Defendants.

Index No.  
10534/72

GROSSMAN, J:

The October 28, 1977 motion by Mr. Connelly is a "renewal" of a motion for summary judgment denied because of the absence of pleadings, and based on an unpledged claim. The cross motion by plaintiff also was previously denied for failure to show an affirmative pleaded claim.

Mr. Connelly does not understand what is meant by an affirmative pleading. It is his *own* complaint or his *own* counterclaim for affirmative relief. He has no affirmative complaint or counterclaim.

Plaintiff renews its cross motion for summary judgment under the principles of collateral estoppel. There is no cause of action in the complaint seeking recovery under principles of

*Order of Judge Grossman Denying Summary Judgment to Respondent*

collateral estoppel and summary judgment is not available on an unpledged claim (Progressive Co. v. Mt. Vernon Clock Corp., 5 A D 2d 166; Harry Ohringer Inc. v. Kass, 28 A D 2d 117).

Furthermore, plaintiff has made a motion for summary judgment on its complaint. It cannot make successive motions for summary judgment thereon (Jerome v. Lewis, 32 A D 2d 648; Levitz v. Robbins Music Corp., 17 A D 2d 801).

Both motions are denied.

Dated: December 13, 1977

**LOUIS GROSSMAN**  
Acting Justice of the Supreme  
Court of the State of New York  
J.S.C.

12a

**ORDER OF JUDGE GROSSMAN GRANTING MOTION  
FOR PREFERENCE TO PETITIONERS**

NEW YORK SUPREME COURT  
COUNTY OF NEW YORK

INDIVIDUAL CALENDAR PART 6

COMMERCIAL TRADING CO., INC.,

Plaintiff,

-against-

AMERICAN EAST INDIA CORPORATION and EUGENE  
W. CONNELLY,

Defendants.

Present:

Hon. LOUIS GROSSMAN  
Justice

Papers numbered

Notice of Motion and Affidavits Annexed	1-4
Answering Affidavits	5
Replying Affidavits	6-7

Upon the foregoing papers this Motion for a preference is granted to the extent of directing the calendar clerk to place this case on the appropriate trial calendar for early trial subject to the approval of the Justice presiding thereat. A copy of this order with notice of entry shall be served on the calendar clerk within ten days of publication hereof.

13a

*Order of Judge Grossman Granting Motion for Preference to Petitioners*

Dated: 12-13-77

LG  
J.S.C.

County Clerk's No. 10534-1972

**COMPLAINT**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

COMMERCIAL TRADING COMPANY, INC.,

Plaintiff,

-against-

AMERICAN EAST INDIA CORPORATION,

Defendant.

Plaintiff, by its attorneys, WACHTELL, LIPTON, ROSEN, KATZ & KERN, complaining of the defendant, alleges:

**FOR A FIRST CAUSE OF ACTION:**

1. Plaintiff is a corporation, duly incorporated under the laws of the State of New York, with its principal office for the transaction of business at 1440 Broadway, New York, New York.

2. Upon information and belief, defendant American East India Corporation (hereinafter "American") is a New York corporation with its principal office for the transaction of business at 25 Broadway, New York, New York:

3. Walker Trading Corporation (hereinafter "Walker") is a New York corporation with its principal office for the transaction of business at 47 West 34th Street, New York, New York.

*Complaint*

4. At all times hereinafter mentioned plaintiff was and still is the owner of a valid and perfected prior security interest in the accounts receivable, contract rights, and inventory of Walker and all documents of title and the goods evidenced thereby belonging to Walker together with the proceeds of such accounts receivable, contract rights, inventory, documents of title and goods.

5. Said security interest was created by virtue of the following instruments:

(a) Accounts Receivable Agreement dated February 19, 1964 between Walker and Plaintiff. (A copy of said Accounts Receivable Agreement is annexed hereto as Exhibit "A" and made a part of this complaint);

(b) Security Agreement (Inventory) dated December 30, 1966 between Walker and Plaintiff. (A copy of said Security Agreement (Inventory) is annexed hereto as Exhibit "B" and made a part of this complaint);

(c) Financing Statements covering the property described in the Accounts Receivable Agreement set forth in paragraph 5(a) hereof, which were duly filed in the office of the Secretary of the State of New York on September 28, 1964 and in the office of the City Register of the City of New York, New York County on September 16, 1964. (Copies of said Financing Statements bearing acknowledgements of filing are annexed hereto as Exhibit "C" and made a part of this complaint); and

(d) Financing Statements covering the property described in the Security Agreement (Inventory) set forth in paragraph 5(b) hereof, which were duly filed in the office of the Secretary of the State of the State of New York and in the office of the City Register of the City of New York, New York County, on

*Complaint*

January 20, 1967. (Copies of said Financing Statements bearing acknowledgments of filing are annexed hereto as Exhibit "D" and made a part of this complaint).

6. By virtue of the advance of monies by plaintiff to Walker and pursuant to the terms of the Accounts Receivable Agreement and Security Agreement (Inventory) (hereinafter collectively referred to as the "Security Agreements") Walker is presently indebted to plaintiff in the amount of approximately \$310,000, which sum is payable upon plaintiff's demand.

7. Upon information and belief in or around December 1967, defendant American, at the request of Walker, opened up letters of credit on behalf of Walker for the purchase by Walker from foreign manufacturers of certain goods to be sold by Walker to Walker's customers under an arrangement whereby defendant American was to receive a fee or finance charge for its furnishing of the said letters of credit.

8. Upon information and belief subsequent thereto and during the period between and including November 1967 and March 1968 Walker sold to certain of its customers footwear, shoes and other goods (hereinafter collectively referred to as "the Goods") for an aggregate price which is not presently capable of being precisely ascertained by plaintiff but believed to be approximately \$200,000, all of which amounts are now due and owing by said customers (said customers are referred to hereinafter as "the account debtors").

9. By virtue of plaintiff's advances of money, the Security Agreements and the filed Financing Statements as aforesaid, plaintiff acquired a prior security interest in the Goods, documents of title representing the Goods, and all account receivable arising out of the sale of the Goods and was and is entitled to collect the said accounts receivable from the account debtors thereon.

*Complaint*

10. A dispute has arisen between plaintiff and defendant American with respect to the ownership of the said accounts receivable arising out of the sale of the Goods by Walker to the account debtors.

11. Defendant American has asserted and claimed that the Goods were imported, paid for, and "were the possession of" defendant American and that the accounts receivable arising from the sales thereof belong to defendant American. Defendant American has further asserted and claimed that Walker was never the owner of the Goods but was merely acting as defendant American's agent in the sales of the Goods and that plaintiff is entitled to receive only the amount of Walker's alleged "commissions" on such sales of approximately 15% of the face amount of said accounts.

12. Plaintiff asserts, claims and hereby alleges that defendant American was neither the owner of the Goods nor the seller of the Goods; that the orders for the Goods were sent by the account debtors to Walker; that the sales contracts for the purchase of the Goods from the foreign manufacturers were in Walker's name; that defendant American merely provided Walker with letters of credit to enable Walker to pay for the Goods; that each of the invoices for the sale of the Goods to the account debtors was on Walker's stationery, and was in Walker's name; that no security agreement of any kind existed between defendant American and Walker; and that defendant American has no security interest whatsoever in the Goods, the proceeds thereof, or the accounts receivable arising out of the sale thereof.

13. Upon information and belief defendant American has notified the account debtors that they should pay the said accounts to it. Upon learning of such notification by defendant American plaintiff notified said account debtors to make such payment to plaintiff. Said account debtors have refused to make payment of the said accounts until the dispute between plaintiff

*Complaint*

and defendant American has been resolved for fear of incurring double liability on said accounts in the event such payment were to be made to the party not entitled thereto.

14. Upon information and belief, all of said account debtors are foreign corporations not qualified or doing business in the State of New York and are not amenable to service of process of this Court.

15. Because of the dispute that presently exists as aforesaid between plaintiff and defendant American with respect to the ownership of said accounts receivable and the right to receive payment thereof, a judicial determination of such dispute is desirable and necessary so that the right of plaintiff to the payment thereof be settled and so that the account debtors liable thereon may be free to pay same to the party entitled thereto without fear of incurring double liability for such payments.

16. Plaintiff has no adequate remedy at law.

**FOR A SECOND CAUSE OF ACTION**

17. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "16" inclusive of this complaint.

18. Defendant American, by virtue of its notification and demand that the said account debtors of Walker pay the accounts to it rather than plaintiff, has interfered with and unless enjoined from doing so, will continue to interfere with plaintiff's security interest in the accounts receivable of Walker thereby causing plaintiff irreparable injury.

19. Plaintiff has no adequate remedy at law.

**FOR A THIRD CAUSE OF ACTION***Complaint*

20. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "19" inclusive of this complaint.

21. The Security Agreements between plaintiff and Walker provide that during their terms, Walker may not sell, pledge, assign, transfer or otherwise encumber or dispose of any of Walker's accounts other than to plaintiff and Walker may not borrow any money on such accounts from any party other than plaintiff.

22. Upon information and belief, at all relevant times herein defendant American had due notice of the Security Agreements between plaintiff and Walker.

23. Upon information and belief, notwithstanding the fact that defendant American had due notice and knowledge of the Security Agreements between plaintiff and Walker, defendant American wrongfully, knowingly, intentionally, maliciously, and without reasonable justification or excuse induced, persuaded and enticed Walker to violate, repudiate and breach the Security Agreements between Walker and plaintiff and to refuse to proceed further thereunder, in that, among other things Walker borrowed money from defendant American to finance its purchase of the Goods on the security of its accounts receivable and intends to borrow money in the future from defendant American and others on the security of its accounts receivable, has refused to borrow money from plaintiff on such security and has stated that it will not in the future borrow money from plaintiff on such security.

24. By reason of the fact that Walker was induced to violate, repudiate and breach the Security Agreements as aforesaid, plaintiff was deprived of the interest, charges and fees it would have received had Walker borrowed the money from

*Complaint*

plaintiff to finance its purchase of the Goods and plaintiff was and will in the future be further deprived of the interest, charges and fees which it could have expected to receive in connection with money which it would have lent to Walker had Walker not violated, repudiated and breached the Security Agreements as aforesaid.

25. By virtue of the foregoing, plaintiff has been damaged in an amount not presently capable of being accurately ascertained but believed to be in excess of \$40,000.

WHEREFORE, plaintiff demands judgment against defendant American:

1. Granting a declaratory judgment in favor of plaintiff, adjudging and declaring:

(a) That plaintiff has a security interest in the accounts receivable of Walker arising out of the sale of the Goods;

(b) That plaintiff's said security interest therein is prior and superior to whatever interest defendant American may have therein; and

(c) That as between plaintiff and defendant American, plaintiff is entitled to have the amounts owing on the said accounts paid to plaintiff.

2. Enjoining defendant American, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with defendant American to whom notice of such injunction shall come, during the pendency of this action and permanently thereafter, from taking any steps to cause the account debtors to pay the accounts to defendant American rather than plaintiff, or to take any other action which would interfere with plaintiff's security interest in the accounts receivable of Walker:

*Complaint*

3. In an amount not less than \$40,000, together with appropriate interest thereon.

4. For the costs and disbursements of this action.

5. For such other, different and further relief as the Court may deem just and proper.

WACHTELL, LIPTON,  
ROSEN, KATZ & KERN  
Attorneys for Plaintiff  
Office and P.O. Address  
230 Park Avenue  
New York, New York 10017  
Tel. No. 889-4300

(Verified by Gerald J. Grossman, as Vice-President, April 4, 1968)

**STATUTES INVOLVED****UNIFORM COMMERCIAL CODE****Applicable Sections (In Pertinent Part)**

Letter of Credit Protection

"UCC 9-106

'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument. . . ."

"UCC 9-106

'Account' means any right to payment for goods . . . which is not evidenced by an instrument. . . ."

"UCC 9-304

Perfection of Security Interest in Instruments, Documents and Goods Covered by Documents

(1) . . . A security interest in instruments . . . can be perfected only by the secured party's taking possession. . . ."

"UCC 9-309

Protection of Purchasers of Instruments and Documents

Nothing in this Article limits the rights of a holder . . . to whom a negotiable document of title has been duly negotiated . . . and such

*Statutes Involved*

holders take priority over an earlier security interest even though perfected. Filing under this Article does not constitute notice of the security interest to such holders. . . ."

**The "Instrument"**

(The single most important document in UCC Article 9, Secured Transactions. The only document which requires *possession* to perfect a secured interest, UCC 9-304, *supra*.)

"UCC 3-104

Form of Negotiable Instruments; 'Draft'; 'Check'; 'Certificate of Deposit'; 'Note'.

(1) Any writing to be a negotiable instrument within this Article must

(a) be signed by the maker or drawer;  
*and* [emphasis added]

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article, *and*

(c) be payable on demand or at a definite time; *and*

(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

24a

*Statutes Involved*

- (a) a 'draft' ('bill of exchange') if it is an order; . . ."

Other

"UCC 1-201

(37) 'Security interest' . . .

The term also includes any interest of a buyer of accounts. . . ."

"UCC 2-201

*Formal Requirements*

(1) . . . a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed. . . ."

"UCC 9-105

(a) 'Account debtor' means the person who is obligated on an account. . . .

(c) 'Collateral' means the property subject to a security interest and includes accounts, contract rights . . . which have been sold.

(d) 'Debtor' means the person who owes payment or other performance of the obligation secured . . . and includes the seller of accounts. . . . Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral. . . ."

25a

*Statutes Involved*

"UCC 9-204

**When Security Interest Attaches;**

(1) A security interest cannot attach until there is agreement that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place. . . .

(2) For the purposes of this section the debtor has no rights

(c) in a contract right until the contract has been made.

(d) in an account until it comes into existence."

"UCC 9-302

**When Filing is Required to Perfect Security Interest;**

(1) A financing statement must be filed to perfect all security interests except the following

(a) a security interest in collateral in possession of the secured party under Section 9-305."

"UCC 9-305

**When Possession by Secured Party Perfects Security Interest Without Filing.**

Omitted in error: —

- (1) ....a security interest is not enforceable against the debtor or third parties unless
- (a) the collateral is in the possession of the secured party; or
  - (b) the debtor has signed a security agreement which contains a description of the collateral... .

26a

*Statutes Involved*

A security interest in letters of credit . . . goods, instruments, negotiable documents . . . may be perfected by the secured party's taking possession of the collateral. . . ."

"UCC 9-306

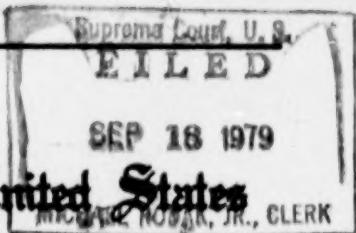
'Proceeds'; Secured Party's Rights on Disposition of Collateral.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds . . . ."

"UCC 9-318

Defenses Against Assignee:

- (1) . . . the rights of an assignee are subject to
- (a) all the terms of the contract between the account debtor and assignor."



In The

Supreme Court of the United States

---

October Term, 1978

No. 79-160

EUGENE W. CONNELLY,

*Petitioner.*

vs.

COMMERCIAL TRADING CO., INC.,

*Respondent.*

---

SUPPLEMENTAL BRIEF FOR PETITIONER

---

THE UNIFORM COMMERCIAL CODE  
( WITH ADDENDUM)

---

EUGENE W. CONNELLY

*Petitioner*

P.O. Box 207

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## TABLE OF CONTENTS

	<i>Page</i>
<b>Uniform Commercial Code</b>	
Background .....	2
The Letter of Credit .....	4
"Contract Rights"; "Account" .....	6
The Egregious Error .....	9
Attorney/Judicial Confusion in the Code .....	12
Wasted Benefits of the Code .....	18
Credentials of Petitioner .....	19
Summary .....	21
Conclusion .....	22
<b>Addendum</b>	
In Reply to Respondent's Brief in Opposition to Petition For a Writ of Certiorari:	
Statement of the Case (Res. Br. 1) .....	23
Reasons For Denying the Writ (Res. Br. 6) .....	30
Jury Trial (Seventh Amendment) .....	30
Due Process (Fourteenth Amendment) .....	31

*Contents**Page*

Denial of the Protection of the Law (Fourteenth Amendment) .....	33
Length of Petition Papers .....	33
Conclusion .....	35

**TABLE OF CITATIONS****Cases Cited:**

Barber v. Intercoast Jobbers and Brokers, 417 S.W. 2d 154 .	13
---	----

**Statutes Cited:**

Internal Revenue Code, Section 6501 .....	18
UCC, Article 9, General Comment, 1972 Official Text, p. xvii .....	
.....3, 5, 6, 7, 9, 10, 11, 12, 15, 20, 22	
1972 Official Text, UCC 9-106; Official Reasons for 1972 Change .....	11
UCC 1-102 .....	2
UCC 1-102(2)(b) .....	9
UCC 1-102(2)(c) .....	9
UCC 1-201(37) .....	8
UCC 2-201 .....	6
UCC 3-104 .....	6

*Contents**Page*

UCC 9-104(f) .....	10, 11
UCC 9-105(a) .....	7
UCC 9-105(c) .....	8
UCC 9-105(d) .....	8
UCC 9-105(i) .....	8
UCC 9-106 .....	3, 7, 9, 11, 12
UCC 9-302 .....	16
UCC 9-304 .....	5, 6, 21, 29
UCC 9-305 .....	6, 14, 15, 16, 18, 21, 29
UCC 9-306 .....	6, 10, 15, 29
UCC 9-306(i) .....	9, 12
UCC 9-306(3) .....	9
UCC 9-309 .....	5, 6, 14, 15, 17, 21, 29
UCC 9-311 .....	28
UCC 10-102 .....	17
<i>STATES</i> United Constitution Cited:	
Seventh Amendment .....	30
Fourteenth Amendment .....	31, 33, 34

*Contents***Rules Cited:**

Supreme Court Rule, Rule 24(4)(5) .....	2
FRCP Rule 60(b) .....	24

**Other Authorities Cited:**

Bulletin No. 1317 (August 20, 1979) — Federal Reserve Bank of New York .....	5
Chase Manhattan Guide For Exporters — Methods of Export Financing, p. 6 (The Chase Manhattan Bank, N.A., New York, N.Y.) .....	6
Irwin Naitove, Modern Factoring p. 18 (Pub. American Management Association) .....	10, 27
Report No. 3, December 15, 1966; Permanent Editorial Board for the Uniform Commercial Code to the Institute and Conference .....	3

**Code of Professional Responsibility:**

DR 7-102(A)(4) .....	24
DR 7-102(A)(5) .....	24
DR 7-102(B)(1) .....	24

In The

**Supreme Court of the United States**

---

October Term, 1978

No. 79-160

EUGENE W. CONNELLY,

*Petitioner,*

vs.

COMMERCIAL TRADING CO., INC..

*Respondent.***SUPPLEMENTAL BRIEF FOR PETITIONER****THE UNIFORM COMMERCIAL CODE  
(WITH ADDENDUM)**

In a 1949 talk to the American Bar Association, Chief Justice Vinson stated:

"[Petitioners] might be well advised . . . to spend . . . more time demonstrating why it is important that the Court should hear them. . . . What the Court is interested in is the actual, practical effect of the disputed decision — its consequences for other litigants and in other situations. . . ."

In the spirit of Justice Vinson's remarks, and in the hope that it will be considered under Rule 24(4)(5), this supplemental brief is submitted in the belief that its subject — The Uniform Commercial Code, and specifically Article 9, Secured Transactions therein — is of such vital importance to the legal, commercial and financing industries of this country, that it is warranted.

## BACKGROUND

In 1942, funded by a large grant from the Maurice and Laura Falk Foundation of Pittsburgh, Pa., supplemented by contributions from the Beaumont Foundation of Cleveland, Ohio, and from 98 business and financial concerns and law firms, the American Law Institute (hereinafter referred to as the "Institute") and the National Conference of Commissioners on Uniform State Laws ("Conference") initiated a project to "uniform" the commercial laws of this country.

While "uniformity" of laws remained a basic purpose of the new code, after ten years of preparation and compilation, two new purposes emerged as more important elements of the code:

"UCC 1-102

(2)(a) to *simplify, clarify and modernize* the law governing commercial transactions;

(2)(b) to *permit the continued expansion* of commercial practices . . ."

To give force and practical knowledge in the compilation of Article 9, Secured Transactions, the project employed committees of:

"practicing lawyers, hard-headed businessmen and operating bankers, who contributed

generously of their time and knowledge so that, not only current business practice, but *foreseeable future developments* would be covered." (General Comment, 1972 Official Text, page xvii).

The code was promulgated by the Institute and Conference, with the endorsement of the American Bar Association, in the fall of 1951.

In 1953, Pennsylvania enacted the code followed by others until today the code has been adopted by every State with the exception of Louisiana; the District of Columbia and the Virgin Islands.

After the initial code was completed, the Institute and Conference added an official comment to explain the code to the legal industry. An egregious error was made in "explaining" Section 9-106 (more, *infra*, p. 9) which spread to complete distortion of the entire article, to a gradual weakening of it by amendment:

"By the time the November (1966) meeting was held, 337 non-uniform, non-official amendments had been made to the various sections of Article 9. Some sections had been amended by as many as 30 jurisdictions, each jurisdiction writing its own amendment without regard to the amendments made by other jurisdictions and, of course, without regard to the Official Text, 47 of the 54 Sections of Article 9 had been non-uniformly amended." (Report No. 3 December 15, 1966; Permanent Editorial Board for the Uniform Commercial Code to the Institute and Conference).

The 1966 meeting led to a complete revision, and the latest devastation, the 1972 Official Text, which does away completely

with areas of protection provided in the original text finalized in 1951.

### THE LETTER OF CREDIT

This instant lawsuit emerged from a universal type of commercial/financing transaction — the purchase of manufactured goods for resale to retail outlets. The petitioner was a purchaser/reseller. To finance such purchases, there are five basic methods:

1. The documentary letter of credit.
2. The documentary draft for collection.
3. Cash in advance.
4. Open account.
5. Consignment.

Of the five, the first two are the most popular.

A letter of credit is a written undertaking of a bank *made at the request of a buyer* to honor drafts or other demands for payment upon compliance with conditions specified in the credit. Every documentary letter of credit calls for a documentary draft.

A "documentary draft for collection" is a draft, with documents attached, put into a seller's bank for collection through a buyer's bank.

A principal advantage of a letter of credit is that the bank's resources can be used to support the credit, so the seller receives the *bank's* guaranty, not the buyer's. The use of a straight

"documentary draft for collection" carries no guaranty, so its use would depend on the trust and confidence of the buyer and seller.

Of the *trillions* of dollars of bank drafts negotiated annually, the Federal Reserve Bank of New York reported that through July, *monthly* outstanding (unpaid) bank draft acceptances averaged \$35,286,000,000 in 1979. The bank's Bulletin No. 1317 (August 20, 1979) reporting from twelve districts showed outstanding (unpaid) acceptances of \$36.989 billion in June 1979. Sophisticated investors deal in those unpaid acceptances. Purchasers can be confident that under the Uniform Commercial Code their security is protected in the bank draft (UCC 9-304) and the documents it covers (UCC 9-309). Parties who require earlier security in the "contact rights" in a contract prior to manufacture of the goods which will lead to the bank drafts, are not that fortunate. Prior to 1972, they could obtain that security. The 1972 Official Text removed contract rights as "unnecessary" (*infra*, p. 11).

To the compilers of Article 9, Secured Transactions, the use of a letter of credit or documentary draft for collection was immaterial. In their aim to *simplify, clarify and modernize* and *permit the continued expansion* of commercial practices, they made mention of neither, but provided protection for both. But, for not highlighting the fact, their efforts wound up in confusion rather than clarification (more, *infra*, p. 10).

The bank draft (also referred to as "bill of exchange"), the carrier of documents of title, the basis of "draft acceptances" bought and sold in world-wide financial markets, is the most powerful financing document in international and domestic trade. In the financing industry, it is:

"... an unconditional order, in writing, signed by a person, usually the seller, and addressed to the buyer ordering him to pay on presentation of

the draft or at some specified future date, the amount of the draft." *Chase Manhattan Guide For Exporters — Methods of Export Financing.* p. 6 (The Chase Manhattan Bank N.A., New York, N.Y.).

The code's definition echoes the industry's:

"... writing . . . signed *and* . . . contain an order to pay . . . *and* . . . on demand or definite time *and* payable to order or bearer." (UCC 3-104) (Pet. 23a<sup>1</sup>).

To assure total protection, the "instrument" (bank draft) is the only document in Article 9, Secured Transactions, which requires *possession* to perfect a security interest (UCC 9-304) (Pet. 22a).

### **"CONTRACT RIGHTS"; "ACCOUNT"**

*Possession* is paramount in Article 9, Secured Transactions. Whether it is the bank draft (UCC 9-304), or the documents of title (UCC 9-309) negotiated with the bank draft, or the goods themselves (UCC 9-305), *possession* achieves the ultimate security and with that security, the right to the proceeds (UCC 9-306).

To assure a direct path of perfected security from the *signing*<sup>2</sup> of a manufacturer's contract through collection of proceeds from the ultimate debtor, the compilers of Article 9 created two new definitions, "contract rights" and "accounts".

1. References preceded by the designation "Pet." are to the Petition for a Writ of Certiorari.

2. A new requirement. Contracts in excess of \$500 must be signed writings (UCC 2-201) (Pet. 24a).

To the period prior to manufacture, a period where a contract can be bought, sold, cancelled, etc., the compilers created "contract rights"; the period after manufacture, "account":

"... any right to payment for goods . . . which is not evidenced by an instrument [bank draft]. . ." (UCC 9-106) (Pet. 22a).

Thus, as the goods remained with the manufacturer (seller) prior to his putting a bank draft (instrument) into his (seller's) bank, the documents covering the goods held the new term "accounts". While the "instrument" (Pet. 23a) is the single most important commercial *document* in Article 9, Secured Transactions, it is the "account" which is the single most important *term*.

An obligor on a manufacturer's contract (the beneficiary of the letter of credit) creates the "account":

"UCC 9-105(a)

'Account debtor' means the person who is obligated on an *account*. . . ."

When the manufacturers in this instant lawsuit, as "account debtors" performed the "contract rights":

"UCC 9-106

'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument [bank draft]. . . ."

into *accounts*:

"Official Comment to UCC 9-106

Contract rights may be regarded as potential *accounts*; they become *accounts* as performance [manufacture] is made under the contract."

they became "debtors":

"UCC 9-105(d)

'Debtor' means the person who owes . . . performance of the obligation secured . . . and includes the seller of *accounts*. . . ."

In line, when the manufacturers put their drafts "in evidence" and drew against American's<sup>3</sup> letters of credit, the petitioner became a "secured party":

"UCC 9-105(i)

'Secured party' . . . including a person to whom *accounts* . . . have been sold."

with a "security interest":

"UCC 1-201(37)

'Security interest' . . . The term also includes any interest of a buyer of *accounts*. . . ."

and the documents of the "account" were converted to "collateral":

"UCC 9-105(c)

<sup>3.</sup> American East India Corporation, the original defendant in this lawsuit and assignor of all interests to petitioner (Pet. 14).

'Collateral' means the property subject to a security interest and includes *accounts* . . . which have been sold."

with a totally secured interest in the "proceeds":

"UCC 9-306(1)

'Proceeds' includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. *The term also includes the account arising when the right to payment is earned under a contract right.*

"UCC 9-306(3)

The security interest in proceeds is a *continuously* perfected security interest if the interest in the original collateral was perfected. . . ."

From assignment of the contracts which created the proceeds at issue (Pet. 32), through delivery to customers to create 37 accounts receivable, the petitioner had a totally secured interest under the Uniform Commercial Code and a total right to the proceeds at issue.

#### THE EGREGIOUS ERROR

Unfortunately, the "hard-headed businessmen and operating bankers" (*supra*, p. 2) did not supply an official comment to explain Article 9 to the legal industry. That was added by the Institute and Conference.

Unfortunately, while "explaining" UCC 9-106, someone had more in mind the relatively unimportant purpose of the code, "make uniform" [UCC 1-102(2)(c)], overlooked "modernize the law" [UCC 1-102(2)(b)] and wrote of the "account":

"Account" as defined is . . . the ordinary commercial account receivable."

It was an egregious error and distorted the entire article. Certainly, in no small measure, the error contributed to the "337 non-uniform, non-official amendments" in 47 of the 54 sections of the article (*supra*, p. 3). Not only are accounts receivable not mentioned in the entire article, but the new "account" and an account receivable are at opposite ends of a commercial transaction.

Certainly, accounts receivable are *implied* in the article. Because of the filing provisions, many mistakenly believed the factoring industry (more than \$12 billion, annually) was the chief beneficiary of the article, being based on accounts receivable:

"Factoring is the outright sale of accounts receivable without recourse. The factor assumes the credit risk and handles all details of collection." Irwin Naitove, *Modern Factoring*, p. 18 (Pub. American Management Association).

But the intelligent compilers of Article 9 never mentioned accounts receivable, for a very good reason — avoid confusion. For every account receivable on the books of a creditor, there is an account payable on the books of a debtor. Rather than discuss both, they discussed neither, and combined them in the single section, "Proceeds" (UCC 9-306).

Ironically, if the legal industry, *and the courts in this instant lawsuit*, took the distortion as fact, every factor, *and respondent Commercial herein*, would be excluded from Article 9, Secured Transactions.

Section 9-104 excludes non-commercial transactions from Article 9. If a manufacturer "performs" a contract right into an

*account* and a buyer reneges in establishing a letter of credit, the manufacturer has every right to assign that *account* to a third party for collection. Obviously, that assignment is not a *secured* transaction:

"UCC 9-104. Transactions Excluded from Article

This Article does not apply

(f) to . . . an assignment of *accounts* which is for the purpose of collection only . . ."

Equally obvious would be the conclusion that if the courts interpret an *account* as an "account receivable", all factors, with their purchase, and assignment, of accounts receivable for collection, would be excluded from Article 9, Secured Transactions, and lose the protection of their filings (Pet. 15a, par. 5).

The "explainers" went on to further distortions of the article. In recognizing that "Contract rights may be regarded as potential *accounts*" (*supra*, p. 8), they concluded that *contract rights* and *accounts* were one and the same. In compiling the 1972 Official Text, they did an Orwell, "1984" job on Article 9 and eliminated every reference to "contract rights":

"The term 'contract right' has been eliminated as unnecessary . . . The term has been troublesome in creating a 'proceeds' problem where a contract right becomes an 'account' . . ." 1972 Official Text, UCC 9-106; Official Reasons for 1972 Change.

Not to be facetious, but would one believe that the intelligent "hard-headed businessmen and operating bankers" who put out such an intelligent Article 9 in 1951, intended:

"The term also includes the account arising when the right to payment is earned under a contract right" [UCC 9-306(1)] (*supra*, p. 9)

to mean:

"The term also includes the account receivable arising when the right to payment is earned under an account receivable."?

#### **ATTORNEY/JUDICIAL CONFUSION IN THE CODE**

It has been said that more than 50% of the attorneys in court in criminal cases are ill-prepared. It can be said that close to 100% of the attorneys in cases involving Article 9, Secured Transactions, are ill-prepared. Every law student starts out misinformed; every textbook that petitioner has read contains errors in Article 9.

In 1975, petitioner wrote to the West Publishing Co. pointing out *contract right/account* errors in a textbook used at a midwest university law school. West did not dispute, but forwarded the letter to the author. The author wrote, quoted the complete "Reasons for 1972 Change" to UCC 9-106, (*supra*, p. 11), including "*Account* is . . . the ordinary commercial account receivable [underlined in his letter]", thus absolving himself, and putting the blame squarely on the Institute and Conference.

Sadly, from experience with this and related lawsuits, it is feared that the confusion in Article 9 has spread to the judiciary and, possibly, a reluctance to hear a case based on the code.

Respondent Commercial's complaint was based on filings under the code (Pet. 15a, par. 5) and Walker's ownership of the collateral (Pet. 17a, par. 12). In December 1972, respondent moved for summary judgment "as a matter of law" (Pet. 12, 24). Their memorandum of law did not mention a single section

which guarantees security by possession but demanded judgment by right of Commercial's *filing* interest in Walker's *contract rights*. Petitioner's attorneys submitted no law, but defeated the motion (J. Fine) and subsequent appeal, by asserting two facts which required a trial.

On November 24, 1974, petitioner moved for summary judgment (Pet. 14), asserting that there were no facts which required a trial; exhibited documents of title which led to the proceeds at issue and claimed a secured right to the proceeds under Section 9-309 (Pet. 22a) which states that "nothing" in the article is superior to such holdings and they are superior to prior secured interests and, specifically, filing. Respondent cross-moved, renewing their earlier claims of a superior secured interest by *filing*.

The court (J. Rosenberg) held the papers for 67 days and then, on *Friday*, January 31, 1975, referred them to the court (J. Fine) who had ruled on respondent's 1972 motion for summary judgment. On *Monday*, February 3, 1975, Judge Fine denied both motions with the surprising ruling that issues were the same as previously ruled on, despite the facts (a) it was petitioner's first motion for summary judgment, (b) in opposing Commercial's motion in 1972, petitioner's attorneys had not quoted a single section of law and (c) petitioner's 1974 motion was based 100% on the law. Judge Fine retired later that year.

On January 31, 1976, Commercial again moved for summary judgment, basing the motion on the principle of collateral estoppel of the Philadelphia Action decision (Pet. 21). Despite the facts (a) the trial was only three weeks away, (b) an interim decision (Philadelphia Action, July 1975) should not serve as a basis for jurisdiction over an earlier action (this instant action, 1968) (*Barber v. Intercoast Jobbers and Brokers*, 417 S.W. 2d 154) and (c) the State of New York's rules of priority that between two legal issues, first in time, first in right, Judge Rosenberg did grant summary judgment but stayed entry

of an order pending submission of "additional affidavits . . . supported by documentary evidence . . ." (Pet. 9a).

Petitioner submitted his affidavit, quoted the code (UCC 9-309); attached seven bills of lading (documents of title) proving ownership of the goods (UCC 9-305) and copies of three documentary letters of credit against which the bills of lading had been negotiated. Commercial was unable to submit a single item of "documentary evidence."

Judge Rosenberg retired December 31, 1976 without signing his memorandum decision into order. The case was assigned to Judge Grossman and apparently the "fear of the Code" continued. In December 1977, Judge Grossman granted petitioner's motion for a trial by preference (Pet. 12a) but instead of hearing the case in his Part 6 where it had been since 1972, he referred it back to the calendar clerk.

On February 21, 1978, the case was assigned for trial to Madame Justice Shainswit. At the outset, she gave every indication of trying it (Pet. 28), but after obtaining the files of the case and studying them during a brief recess, she shut the trial off and made the "law of the case" Judge Rosenberg's memorandum decision (Pet. 7a) and granted summary judgment to respondent.

The Appellate Division affirmed Judge Shainswit's summary judgment decision (Pet. 29). The New York State of Appeals denied the motion for leave to appeal (Pet. 1a).

At no time, in the seven years that this case was assigned to a Part for trial, has any court agreed to try the case, or decide a motion, based on the Uniform Commercial Code. Further, it would appear that courts *avoided* the responsibility of having to make a decision in the code.

The protection of the laws of Article 9, Secured Transactions, should be the easiest of all laws to administer:

1. Who owned the documents of title?

UCC 9-309 — "Nothing in this Article limits the rights of a holder . . . to whom a negotiable document of title has been duly negotiated . . ." (Pet. 33).

2. Who owned the collateral?

UCC 9-305 — "A security interest in . . . goods . . . negotiable documents . . . may be perfected by the secured party's taking possession of the collateral . . . A security interest is *perfected by possession* from the time possession is taken without relation back . . ." (Pet. 34).

3. That party has a totally secured interest in the proceeds.

UCC 9-306 — "(3) The security interest in proceeds is a *continuously perfected security interest* if the interest in the original collateral was perfected . . ."

The record in this petition and similar lawsuits could be the simplest of records:

1. Copy of the bills of lading (documents of title) against which the goods were imported;

2. Copy of bank's "Advice of Debit" (with attached documents of title) negotiated to secured party;

3. And, to embellish the record though not a document of title, a copy of the letter of credit against which the bank draft, and documents of title, was negotiated.

In the instant appeal under petition, copies of each — bills of lading, advices of debit and letters of credit — were in

petitioner's Appendix to the Appellate Division, but they meant nothing to the court. Respondent had no records of any transaction and did not submit an Appendix.

In 1976, petitioner sued respondent for release of funds held in connection with the Commercial/Walker Accounts Receivable Agreement (Pet. 37). Commercial moved to dismiss on statute of limitations. Despite the fact that petitioner exhibited copies of the agreement and the filed U.C.C. Financing Statement (Form 1) (Pet 15a, par. 5) both current on the day exhibited, the court (J. Kirschenbaum) dismissed two complaints with the astounding ruling that "No provision of the Uniform Commercial Code is applicable . . .".

One court, in a related case (Philadelphia Action, Pet. 21), did venture into the code, with drastic results. Regrettably, it can be demonstrated that *every* conclusion in the code was incorrect. One example:

"Section 9-302 provides that a financing statement must be filed to perfect all security, with certain specific exceptions. Commercial had perfected by filing in this case so there is no need to discuss the exceptions." (400 F. Supp. 161, f. 16).

The first "specific" exception is:

". . . a security interest in collateral in possession of the secured party under Section 9-305." (Pet. 25a).

The court had "summarized" earlier (400 F. Supp. 153) that American had imported the collateral for its own account, thus becoming a secured party under UCC 9-305 (Pet. 25a) by possession of the collateral. Clearly, American's possession (UCC 9-305) took superiority over Commercial's filing (UCC 9-302).

Judge Green's post-trial consideration of the code began in very confusing circumstances. The complaint was based on American's attempt to collect proceeds of an Ideal Shoe Co. "account receivable." Under UCC 10-102, all previous acts regulating accounts receivable had been repealed, bringing them under the code, yet the court had received from plaintiff American's New York attorney (33 partners) and Philadelphia attorney (104 partners):

(a) a 37-page Trial Brief with 19 pages under the title,

*The U.C.C. Does Not Apply To The Instant Transactions.*

(b) a 20-page Reply Brief of Plaintiff *received post-trial* with four pages under the heading *The Code Does Not Apply*.

(c) a 114-paragraph Request For Findings of Fact and Conclusions of Law, with not a single paragraph devoted to law of any type.

Aware of this instant action, Judge Green waited more than two years for a trial and decision in the New York action.

Aware of the decision being awaited in the Philadelphia Action, the New York courts refused to hear the New York action.

It was during that two-year wait that petitioner made his study of the code and facts of the Commercial/Walker financing relationship which resulted in the Perjury Papers (Pet. 23).

Ironically, by finding that Bank of America had negotiated the documents of title to American (400 F. Supp. 151); that States Marine Lines had released the collateral to American (400 F. Supp. 152) and summarizing that American had imported for its own account (400 F. Supp. 153), Judge Green had, within the Code: "Nothing" in the Code limited the rights of a holder of documents (UCC 9-309) (Pet. 22a); security interest

gained by possession of collateral (UCC 9-305) (Pet. 25a); and security interest *continuously* perfected in proceeds (UCC 9-306) (Pet. 26a), all favoring American and all protecting American's right to the proceeds. By ruling within the code, a brief, concise memorandum decision could have been written (and the following six years of court confusion and inundation avoided) in 1973. Instead, in 1975, Judge Green released a confused 53-page memorandum decision granting Commercial 26% of the proceeds because, he said, American had "converted" a contract right, despite the fact that no party exhibited a contract at trial. Couldn't, because none existed. American had delivered their collateral against Ideal's telephoned promise to pay on receipt of the goods.

#### **WASTED BENEFITS OF THE CODE**

Because of the confusion in the code and because of the possibility that courts are reluctant to hear cases in the code, a number of benefits in the code are being wasted.

One example: One of the greatest boons to the growth of our national economy, and growth of employment, was the advent of consumer credit/installment buying. Before the code, most jurisdictions held that a seller had to proceed against a defaulted contract within six years. With proper understanding of the code, every installment contract could be amended to give the seller a *continuous* right to proceed in a default.

The Internal Revenue Service puts all of us on notice that their right to proceed against a fraudulent tax return is *continuous*; there is no statute of limitations:

#### **"Internal Revenue Code**

Sec. 6501(c)(1) — In the case of a false or fraudulent return . . . a proceeding in court . . . may be begun . . . *at any time*."

Should not an honest seller of goods have a *continuous* right to proceed against a default or conversion? The code eliminates a statute of limitations:

#### **"Uniform Commercial Code**

Sec. 9-306(3) — (3) The security interest in proceeds is a *continuously* perfected security interest . . . (until) . . . ten days after receipt of the proceeds . . ." (Pet. 26a).

#### **CREDENTIALS OF PETITIONER**

The original proceeds at issue in this lawsuit (\$162,395.47, Pet. 20), by Commercial's withdrawal of all claims in their complaint except a single account receivable in an escrow account (Pet. 30) in order to escape trial on facts and law, shrunk to \$66,363.11. Petitioner was awarded \$51,239.15 which, with accumulated interest, totaled \$84,636.64. In August 1978, petitioner's original attorneys who already had been paid \$25,569.93 (July 18, Pet. 13), petitioned to enforce an attorney's lien for \$56,535.12 against the \$84,000 award. Petitioner cross-moved for an order "directing [the attorneys, American and Connelly] to appear at a place and time specified by the Court . . . to determine a total amount of legal fees to be paid, if any, [to the attorney]."

Where the elapsed time to await a decision in more than twenty motions that petitioner had been involved in that court (Part I, Special Term, N.Y. Sup., N.Y. Cty.) ranged from three weeks to five months, the decisions in the petition and cross-motion were made in one day, in favor of the attorney. Those decisions, also, went the "two-word route" of New York's higher courts ["affirmed", without opinion in Appellate Division; "denied", without opinion (leave to appeal) in Court of Appeals], despite numerous citations (including the court appealed to) that

"the lien must be measured by value of services" and "A court is without power to summarily determine amount of attorney's fee."

A principal feature of the attorney's petition was the naming of a number of partners who had "worked" on this lawsuit, with the names of their law schools noted (Harvard predominated). So, in the reluctant belief that credentials may be more important than fact, logic and law, herewith are some of the credentials of petitioner. Possibly they may not be too far below those of the "hard-headed businessmen" who worked so hard to compile the Code's Article 9 in 1951 (the good one):

More than thirty-five years experience in international trade and finance, including:

President, American East India Corporation, an export-import company.

President, Emocee Traders, Ltd. Canada, a footwear importer.

President, Manhattan Overseas Co., Inc., a freight forwarder.

President, Bharat Overseas Corporation, an import agent.

Director, Hong Kong Commercial House, Ltd., Hong Kong.

As President of American East India Corporation (activated in 1955 as a one-man operation):

a. Initiated, and conducted American negotiations, to return General Motors to India in the early 1960's in licensing operations to manufacture trucks and

earthmoving equipment after their expulsion by the Government of India in mid-1950's.

b. Sales agent (India) for General Motors Electromotive Div.

c. American negotiator for licensing agreements for manufacture in India: Westinghouse (motors); Kimberley Clark (paper); Federal Mogul Corporation (bearings); Clearing Machine, Chicago (heavy-duty presses).

d. American negotiator with Export Import Bank ("Eximbank") and Agency For International Development ("A.I.D."), Washington D.C. for loans to companies in India.

e. American agent for largest group of industrial companies in India (Birla Group, listed in Eximbank files in excess of 100 companies).

f. Against the strictest of strict financing and shipping regulations of government agencies, shipped more than \$70 million of U.S. goods, financed by Eximbank, A.I.D. and A.I.D./Government of India, jointly.

## SUMMARY

There is one basic fact in a commercial transaction — the transaction *must* be covered by a document.

There is a basic fact in the Uniform Commercial Code — *possession* is paramount — "instruments" (9-304); "goods" (9-305); "negotiated documents of title" (9-309).

If those two facts are accepted by the courts, complications when adjudicating in the code would be minimal.

## CONCLUSION

Certainly, for selfish reasons, petitioner prays that this petition for a writ is granted, but in the solemnity of truth it is hoped that Article 9, *Secured Transactions*, of the Uniform Commercial Code, will be recognized for what it is - a code of law to protect a party with an honest, *secured* right to the proceeds of a commercial *transaction* — which petitioner did, and does, have, and could have proven in court, if the courts of New York State had permitted him to be heard in court.

Respectfully submitted,

Eugene W. Connelly  
*Petitioner, Pro se*

## ADDENDUM

### IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

#### STATEMENT OF THE CASE (Res. Br. 1<sup>4</sup>)

Respondent Commercial is fortunate to be represented by a firm with many lawyers. This instant lawsuit is an initial attempt by Commercial to convert almost \$500,000 legally due petitioner and two partners of Walker, American's sales agent. Commercial's counsel was given ample warning of the attempted conversions (Pet. 36). Nevertheless, they put forward an attorney to support the deceit. As lies were exposed, new attorneys would appear. To date, seven Weil Gotshal & Manges attorneys have submitted papers to New York State courts on behalf of respondent. The veracity of present counsel in opposition is no improvement.

Immediately, the day the Perjury Papers (Pet. 23) were completed a copy was hand-delivered to Grossman, in the naive belief that as an attorney, with his Philadelphia Action trial testimony perjury exposed, he would take steps to end this lawsuit. Grossman stonewalled. The Perjury Papers were delivered to respondent's new attorney who, although they had forced postponement of a May 1, 1974 pre-trial conference date to "familiarize" themselves with the case, had not yet put a paper into court on behalf of Commercial (Pet. 36).

Upon completion of deposition and delivery of the 56 exhibits to substantiate the perjury accusations and fraud (Pet. 23), again in a naive belief, it was expected that respondent's attorney would honor their Code of Professional Responsibility

4. References preceded by the designation "Res. Br." are to the "Brief in Opposition to Petition for a Writ of Certiorari" of respondent.

and "call upon his client to rectify same" [DR7-102(B)(1)] and if Grossman did not, they would "reveal the fraud to the affected person or tribunal."

Obviously the latter did not happen, because on January 31, 1976 the attorneys moved for summary judgment (Pet. 24, 7a) and exhibited the complete memorandum decision of Judge Green (400 F. Supp. 141) gained by the perjured testimony of Grossman, in defiance of their ethical code that they should not "knowingly use perjured testimony or false evidence" [DR7-102(A)(4)].

By 1977, petitioner feared that Commercial would succeed in using the Philadelphia Action decision to keep this case from trial. On February 4, 1977, petitioner moved in District Court (Ea. Pa.) for "Relief From (Judge Green's) Order, pursuant to Rule 60(b) — (2) newly discovered evidence; (3) fraud; (6) other reasons, and the power of the Court to set aside an order gained by fraud upon the Court. . ." Judge Green denied the motion "as filed more than one year after the entry of the order from which relief is sought." That decision was appealed and affirmed [568 F.2d 768 (3rd Cir. 1978)].

The Perjury Papers were compiled and circulated in July 1974. The denial of petitioner's 1977 motion for relief from order was affirmed in 1978. If the courts were to believe that the 1978 ruling was an affirmation of Judge Green's decision in the Philadelphia Action (Pet. 21), and this instant case could be kept from open trial, the Perjury Papers would be negated. Respondent set out to deceive the courts.

At trial, respondent counsel Lemberger, in direct defiance of the code of ethics that he would not "knowingly make a false statement of fact" [DR7-102(A)(5)] told the court that the Third Circuit had affirmed Judge Green's decision (Pet. 23).

At appeal to the Appellate Division, petitioner disclosed to the court that respondent attorney Simon (co-counsel at trial), in

his Respondent's Brief, was also attempting to deceive the court that the Third Circuit had affirmed Judge Green. At oral argument, Simon apologized, attributed the "mistake" to careless reading of the Federal Reporter and volunteered to submit a correcting paper.

Now, to this Court, we have attorney Miller (Res. Br. 2):

"The controlling facts underlying this suit as set forth in *American v. Ideal*, 400 F. Supp. 141 (E.D. Pa. 1975), *aff'd* [emphasis in Res. Br. 5], 568 F.2d 768 (3rd Cir. 1978)."

While attorney Simon did have the excuse of "careless" reading to fall back on, attorneys Lemberger and Miller have no such escape. On August 14, 1975, in the Philadelphia Action, *Ideal* (for Commercial) filed a Notice of Appeal in the Third Circuit with "Alan B. Miller, Esquire, Weil, Gotshal & Manges" as attorney "for Ideal Shoe Company" and posted a supersedeas bond. Miller and Lemberger directed the appeal from New York. Copies of correspondence and documents were sent to them, individually, including the Third Circuit's Order (J. Seitz) granting Commercial's motion to dismiss their appeal (Pet. 22).

Lemberger (at trial), Simon (at appeal) and Miller (herein), each was aware of the true facts and for them to attempt to deceive three courts, no matter the level of jurisdiction, was totally deceitful with an intent to have Commercial's conversion plot succeed.

At the Philadelphia Action trial, respondent's general counsel, Grossman, told a totally perjured story of (a) Commercial having financed Walker from 1964 until July 1967 when (b) Walker applied for a \$54,000 letter of credit at three

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5. Emphasis also shown in Table of Authorities under Table of Contents of Respondent's Brief.

meetings during August/November 1967 but (c) Commercial did not establish any letters of credit because (d) Walker was heavily in debt to Commercial and (e) could not put up margin to back the letters of credit (400 F. Supp. 149); and Commercial made advances to Walker to cover payroll and other expenses (400 F. Supp. 147).

To supply a "Statement of the Case" for his brief, counsel Miller parroted the Grossman perjury knowing full well that the 56 exhibits delivered to Weil Gotshal in connection with the January 29, 1975 deposition of petitioner (Pet. 23) included at least one exhibit to expose each of his iniquitous statements:

"From February 19, 1964 until at least July, 1967 CTC provided financing to Walker . . ." (Res. Br. 2).

#### Truth:

Exhibit 5 (to Perjury Papers) consisted of Walker invoices financed by Commercial from August 1, 1967 through December 31, 1967.

Exhibit 6 — \$76,500 of Commercial-approved Walker letters of credit, August 1, 1967 through December 31, 1967.

Exhibit 7 — Letter of credit applications submitted by Walker during August/December 1967, each stamped approved by Commercial.

Exhibit 37 — a Walker letter of credit application dated November 19, 1967 bearing the handwritten approval of "Gerald J. Grossman."

Exhibit 48 — a chart listing by dollar amount and individual steamer names, 46 shipments totalling \$157,588.10 financed by Commercial for Walker during August/December 1967.

\* \* \*

"CTC also advanced money to Walker to cover Walker's payroll and other expenses." (Res. Br. 2).

#### Truth:

By the Commercial/Walker Accounts Receivable Agreement [400 F. Supp. 147 (L2)] Commercial contracted to purchase Walker accounts receivable and pay Walker 80% at time of purchase. Grossman attempted to deceive the court into believing that the money advanced at time of purchase were loans.

Exhibit 47 — was an extract (pp. 20-21) from "Modern Factoring" by Irwin Naitove (Pub. American Management Association) which stated:

"These cash advances are not loans since they are made against money due to the client at a later date. On the client's balance sheet there is no liability to the factor for funds that have been advanced."

\* \* \*

". . . because Walker was experiencing financial difficulty, CTC insisted that Walker provide it with additional collateral . . ." (Res. Br. 2).

#### Truth:

Walker *never* provided collateral. Commercial purchased Walker's accounts receivable. Commercial's first purchase, \$20,475.44, was made on March 3, 1964. Against that

\$20,475.44, Commercial "advanced" \$14,000 to Walker. From that day, *and to this very day*, Commercial held, and should be holding, balances to the credit of Walker.

\* \* \*

"As part of this agreement, Walker assigned to AEIC the Anthony and Ideal purchase orders . . . despite the fact that the Security Agreement . . . prohibited Walker from transferring or encumbering any of its accounts, contract rights or other collateral." (Res. Br. 3).

**Truth:**

The Uniform Commercial Code effectively negates any such prohibition.

**"UCC 9-311"**

The debtor's (Walker's) rights in collateral may be voluntarily or involuntarily transferred . . . notwithstanding a provision in the security agreement prohibiting any transfer. . . ."

\* \* \*

"Lawsuits were soon commenced by both CTC and AEIC as a result of their dispute over ownership of these Walker contract rights." (Res. Br. 3).

**Truth:**

Strictly a red herring to divert the Court from the truth. The only "dispute" was ownership of goods. In this instant

lawsuit, Paragraphs 10 through 15 of the complaint (Pet. 17a) speak for themselves.

American's complaint in the Philadelphia Action was a brief eight-paragraph, two-page document limited strictly to a demand for judgment because of Ideal's failure to pay for goods delivered against a promise to pay.

American's 1971 lawsuit against Commercial (Pet. 35) was fraud, etc.

Petitioner's three lawsuits against Commercial (Pet. 37) were to recover funds held illegally by Commercial.

"Contract rights" were never a part of any complaint in any action. Commercial interjected "contract rights" on the opening day of trial in the Philadelphia Action when it was patently obvious that American owned every document of title and the goods at issue.

\* \* \*

"When a dispute arose as to the sufficiency of Connelly's proof, a trial on the issue of damages was ordered. . . ." (Res. Br. 5).

**Truth:**

Totally untrue! A *completely* false statement! While respondent's foregoing attempts to deceive the Court take on an appearance of respectability by references to Judge Green's decision in the Philadelphia Action (400 F. Supp. 141), this statement has absolutely *no* substance.

At every point possible, petitioner exhibited the bills of lading against which the goods that created the proceeds at issue, were imported, and which give total protection under the code (UCC 9-304, 9-305, 9-306, 9-309).

A commercial/financial transaction is based on documents. *Proof* can be verified *only* by the production of documents. At trial, Commercial exhibited no documents. To the Appellate Division, Commercial did not submit an appendix or financial documents of any type.

After Judge Rosenberg retired without signing his memorandum decision into an order, and Judge Grossman would neither sign it, nor order the case to trial, in total frustration, in 1977 petitioner wrote a series of letters to the Administrative Judge (Pet. 27), each opposed by respondent's attorneys, trying to get the case to trial.

In November 1977, petitioner moved (granted, Pet. 12a) for a Trial By Preference (in tenth year of lawsuit). A trial was ordered only because that motion was granted.

This lawsuit was born in deceit in 1968, nurtured through the courts for more than ten years in deceit and for respondent to now state that a trial was *ordered* (by whom?) because "a dispute arose as to the sufficiency of Connelly's proof" is proof positive that respondent's attorneys will continue that deceit to *any* court.

#### **REASONS FOR DENYING THE WRIT (Res. Br. 6)**

##### **Jury Trial (Seventh Amendment)**

From the time this lawsuit was filed, a jury trial was demanded. Judge Grossman granted petitioner's motion for a trial, but referred the case to the calendar clerk. In Assignment Part (J. Rubin) (Pet. 28), petitioner stated that he would limit his right to the proceeds strictly on the law, and so waived a jury trial. In no way was that waiver volunteered to permit the court to grant summary judgment without trial.

##### **Due Process (Fourteenth Amendment)**

The lower courts were informed that petitioner was denied due process. On June 6, 1977, a letter was sent to Judge Dudley:

"I refer to the Weil, Gotshal & Manges letter of June 2nd.

That must be a big law firm. To date, I have contended with Messrs. Stanton, Miller, Bernfeld, Lemberger, Bonacquist, Weiss and now, Mr. Simon.

One would think that if so much manpower has to be diverted to this one case, one would want to end it quickly with a one day trial.

But one could be wrong. It appears now as if the fight is to keep the lawsuit from going *to* trial. I trust they will not be accommodated.

Mr. Simon suggests a novel approach — a conference!

For almost ten years we have talked, talked, talked. I made four depositions; appeared in court for motions many times; appeared at Weil Gotshal's office re their client's perjury; appeared at referee hearings, and now Weil Gotshal wants a conference.

If one is held, so be it, but I will tell you my position in advance. There has been no order issued in this lawsuit. I will ask for a brief one day trial. If that is not granted, *I will ask that an order be issued, so it can be appealed.*

*cc: Judge Grossman  
Weil Gotshal & Manges"*

No conference was held. Six months later Judge Grossman ordered a trial (Pet. 12a). Judge Rubin assigned the case for trial, but Judge Shainswit denied a trial on facts or law (Pet. 28). A notice of appeal (to the Appellate Division) was filed May 3, 1978. Herewith, is an extract from petitioner's Pre-argument Statement filed with the notice:

*"Grounds For Reversal"*

Among others:

1. *Denial of due process of law*

Court made 'law of the case' a memorandum decision, not signed into an order, of a judge now out of court. By doing so, defendants were barred from appealing the order if, in fact, any judge did sign the memorandum into an order.

On April 1, 1976, Judge Samuel Rosenberg. . .

At no time has an order in regard to summary judgment in this case been in existence so that it could be appealed."

The antiquity of respondent's citations is interesting — 1878, 1889, 1907, 1943, all prior to the birth of the Uniform Commercial Code.

**DENIAL OF THE PROTECTION OF THE LAW  
(FOURTEENTH AMENDMENT)**

"No State shall . . . deny . . . the equal protection of the laws."

Petition at page 40 states:

". . . Article 9 gives to every party. . . complete protection . . .

When Governor Rockefeller signed the Uniform Commercial Code legislative bill into law in 1964, *that complete protection was extended to every user of a letter of credit in New York State, including the petitioner herein.*"

When the trial court refused to permit the petitioner to cite the law which guaranteed his rights to the proceeds ["I would like to read the law into the record" — "No, sir" (Pet. 28)], petitioner was denied "the equal protection of the laws" guaranteed by the Fourteenth Amendment.

**LENGTH OF PETITION PAPERS**

Petitioner sincerely regrets the length of these papers.

This lawsuit should have been dismissed by summary judgment in 1968 (Pet. 3-8). If it went to trial, it could have been decided on law with hardly more than five minutes testimony (Pet. 27). If it was necessary to prove the fraud of the case, petitioner had subpoenaed Commercial's Grossman (Pet. 23) to appear in court on opening day of trial. Grossman flaunted that subpoena but his non-appearance became moot when the court granted summary judgment.

By that summary judgment, petitioner was denied rights under the Fourteenth Amendment. In this petition that fact could be stated simply, but to prove, by papers alone, some of the fraud of respondent and deception of attorneys to prevent that fraud from being exposed, takes much longer than petitioner would like, and I believe the Court also, so I apologize sincerely, for the extended length of the papers.

## CONCLUSION

"Petitioner Connelly . . . suffering from 'great emotional disturbance . . . bitterness and confusion' (Pet. 6a)." (Res. Br. 2).

The balance of the judge's statement was ". . . Indeed, he stated . . . this case has become the main interest in his life." (Pet. 6a).

Although the trial court granted summary judgment and refused to hear any testimony on facts and law (Pet. 27), she filed a six-page "Findings . . ." (Pet. 2a), but gave no sources for them. The trial transcript, however, does belie the above statement:

"THE WITNESS: I understand completely, Your Honor, but you see I am a retired man now and I have to steer my life some way, and my life is dedicated to getting the Uniform Commercial Code accepted as the code of business . . ." (T141).

While, for purely selfish reasons, it is hoped this petition for a writ of certiorari is granted, it is also hoped that the petition is granted so that the business and financial communities of this country can be shown that they do have a code of law to protect them — the Uniform Commercial Code.

Respectfully submitted,

Eugene W. Connelly  
*Petitioner*

AUG 28 1979

*MICHAEL RODAK JR. CLERK*

IN THE  
**Supreme Court of the United States**  
**OCTOBER TERM, 1979**

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No. 79-160

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EUGENE W. CONNELLY,

*Petitioner,*

*vs.*

COMMERCIAL TRADING CO., INC.,

*Respondent.*

---

**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

---

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## TABLE OF CONTENTS

	PAGE
Question Presented .....	1
Statement of the Case .....	1
Reasons for Denying the Writ	
The Grant of Summary Judgment Did Not Deny Petitioner Any Seventh Amendment Right to a Jury Trial or Any Fourteenth Amendment Right to Due Process .....	6
Conclusion .....	7

## TABLE OF AUTHORITIES

### Cases:

<i>American East India Corporation v. Ideal Shoe     Company</i> , 400 F. Supp. 141 (E.D. Pa. 1975), aff'd, 568 F.2d 768 (3d Cir. 1978) .....	2, 3
<i>Corry v. Campbell</i> , 154 U.S. 629 (1878) .....	6
<i>Diamond Door Co. v. Lane-Stanton Lumber Co.</i> , 505 F.2d 1199 (9th Cir. 1974) .....	6
<i>Fidelity and Deposit Co. v. United States</i> , 187 U.S. 315 (1902) .....	6
<i>Marrow v. Brinkley</i> , 129 U.S. 178 (1889) .....	6
<i>Minneapolis &amp; St. L.R.R. v. Bombolis</i> , 241 U.S. 211 (1916) .....	6
<i>Mitchell v. W.T. Grant Co.</i> , 416 U.S. 600 (1974) .....	6
<i>Patterson v. Colorado</i> , 205 U.S. 454 (1907) .....	6
<i>Thomson v. Butler</i> , 136 F.2d 644 (8th Cir. 1943) .....	6
<i>Wartman v. Branch 7, Civil Division, County Court</i> , 510 F.2d 130 (7th Cir. 1975) .....	6

### Constitution:

Seventh Amendment .....	6
Fourteenth Amendment .....	6

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

No. 79-160

EUGENE W. CONNELLY,

*Petitioner,*

*vs.*

COMMERCIAL TRADING CO., INC.,

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---

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF NEW YORK, APPELLATE DIVISION FIRST DEPARTMENT

---

**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

---

Respondent Commercial Trading Co., Inc. respectfully submits this Brief in opposition to the Petition for a Writ of Certiorari.

**QUESTION PRESENTED**

Did the Supreme Court of the State of New York, in granting summary judgment to respondent on the basis of *res judicata* and collateral estoppel, deny petitioner the right to trial by jury and due process of law, as provided for by the seventh and fourteenth amendments to the Constitution of the United States?

**STATEMENT OF THE CASE**

Respondent Commercial Trading Company, Inc. ("CTC") is in the business of commercial financing. American East India Corporation ("AEIC") is in the import-export

business. Petitioner Eugene W. Connelly ("Connelly") is the past president of AEIC and is, as described by one of the many jurists who have been involved in this and related cases, suffering from "great emotional disturbance . . . bitterness and confusion" (Pet. 6a).\* The controlling facts underlying this suit, as set forth in *American East India Corporation v. Ideal Shoe Company*, 400 F. Supp. 141 (E.D. Pa. 1975), aff'd, 568 F.2d 768 (3rd Cir. 1978), are as follows:

From February 19, 1964 until at least July, 1967, CTC provided financing to Walker Trading Corporation ("Walker"), a footwear importer. Walker ordered goods from overseas manufacturers to fulfill orders it had received from domestic companies, and CTC financed these orders by obtaining letters of credit from banks. CTC also advanced money to Walker to cover Walker's payroll and other expenses. 400 F. Supp. at 147. To secure these advances, in 1964 CTC and Walker entered into an accounts receivable security agreement and rider, pursuant to which Walker granted to CTC a security interest in all present and future accounts receivable, contract rights, and the proceeds thereof ("Security Agreement"). UCC financing statements with respect to this Agreement were properly filed and renewed. 400 F. Supp. at 147-48.

In July, 1967, Walker received purchase orders from the Ideal Shoe Company ("Ideal") and the C. R. Anthony Company ("Anthony"). Walker requested CTC to finance these orders but, because Walker was experiencing financial difficulty, CTC insisted that Walker provide it with additional collateral and that Walker reform its manner of conducting business. When Walker was unable to provide CTC with the additional collateral, Walker turned to AEIC. 400 F. Supp. at 149.

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\* References preceded by the designation "Pet." are to the Petition for a Writ of Certiorari.

In December of 1967, AEIC and Walker agreed that Walker would act as a sales representative for AEIC, obtaining orders in AEIC's name, to be filled by AEIC. As part of this agreement, Walker assigned to AEIC the Anthony and Ideal purchase orders, 400 F. Supp. at 150-51, despite the fact that the Security Agreement between CTC and Walker prohibited Walker from transferring or encumbering any of its accounts, contract rights or other collateral. 400 F. Supp. at 147. AEIC thereafter imported shoes to fill the Anthony and Ideal purchase orders. In February of 1968, CTC learned of the AEIC-Walker arrangement and informed Ideal that payments for merchandise received on Walker orders should be made only to CTC. 400 F. Supp. at 152. Ideal eventually paid CTC, in exchange for CTC's promise to defend and indemnify it should AEIC sue. 400 F. Supp. at 154.

Lawsuits were soon commenced by both CTC and AEIC as a result of their dispute over ownership of these Walker contract rights. In April of 1968, CTC instituted this action in the Supreme Court of the State of New York, seeking a declaratory judgment regarding its right to collect the disputed accounts receivable, as well as injunctive and monetary relief.\* AEIC thereafter instituted *American East India Corp. v. Ideal Shoe Company*, *supra*, in the United States District Court for the Eastern District of Pennsylvania, which was defended by CTC pursuant to its indemnification agreement with Ideal.

The *Ideal* case was decided first. After many years of complex litigation, Judge Clifford Scott Green rendered a judgment after trial. In his opinion, Judge Green held that

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\* Anthony placed the sum of \$66,363.11 in escrow pending the outcome of this litigation. While initially over thirty accounts were in dispute, only the Ideal account which was paid to CTC and the Anthony account which was placed in escrow remain the subject of this action. CTC has voluntarily discontinued its claims for injunctive and compensatory relief.

AEIC's rights with respect to Ideal were limited to those due it as a performing assignee of the Walker contract right. 400 F. Supp. at 155. He then held that, pursuant to the provisions of Article 9 of the Uniform Commercial Code, both CTC and AEIC had a legal interest in the Walker-Ideal contract right and that CTC's interest was superior to AEIC's. 400 F. Supp. at 164-65. However, Judge Green determined that CTC was not directly entitled to the Ideal proceeds, but rather was limited to a damages claim arising out of AEIC's conversion of the Walker-Ideal contract, and that the amount of damages flowing from this conversion was measured by the Walker-Ideal contract price less the cost of performing the contract. 400 F. Supp. at 168-69. Judge Green thus awarded CTC approximately 26% of the disputed proceeds, and AEIC the remainder.

Following the decision in the *Ideal* action, CTC moved for summary judgment in this action, arguing that the *Ideal* judgment constituted *res judicata* and collateral estoppel as to that portion of its complaint which sought declaratory relief with regard to the Anthony account. Connelly, who had been added as a party defendant at his own insistence, opposed this motion, alleging that the *Ideal* decision was based upon perjured testimony. On April 1, 1976, the Court (Rosenberg, J.) granted CTC's motion (Pet. 7a-9a). Thereafter, Connelly moved for leave to reargue, repeating and expanding upon his allegations of fraud and perjury. This motion was denied on May 12, 1976. A second motion for reargument was denied on March 8, 1977. Connelly thereafter made a further motion, denominated "for removal of evidence obtained through perjured testimony," the thrust of which was that CTC deceived the Court by attaching as an exhibit to its summary judgment papers Judge Green's decision in the *Ideal* action. On June 29, 1977, that motion was denied.\*

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\* Certain other of Connelly's machinations are described at page 4a of the Petition.

In his April 1, 1976 opinion, Mr. Justice Rosenberg adopted the measure of damages applied by Judge Green, directed the parties to submit affidavits concerning the amounts to be awarded each, and reserved entry of an order pending submission of those materials (Pet. 9a). When a dispute arose as to the sufficiency of Connelly's proof, a trial on the issue of damages was ordered and held before Madam Justice Shainswit on February 21, 22 and 23, 1978.

At this trial, Connelly again attempted to reargue the summary judgment motion, contending that since no order had been entered on Mr. Justice Rosenberg's decision, Madam Justice Shainswit was not bound by it. This argument was rejected on the ground that Mr. Justice Rosenberg's decision constituted the law of the case (Pet. 39). Testimony was then taken and in a decision dated March 21, 1978, the Court issued its findings of fact and conclusions of law (Pet. 2a-6a). In sum, the Court found that AEIC had proven costs in fulfilling the contract of \$51,239.15. Consequently, CTC would be entitled to the amount held in escrow less this cost figure, with the parties to divide the accrued interest on a pro rata basis. A final judgment was entered on April 24, 1978, and the money held in escrow thereafter distributed. On November 21, 1978 this judgment was affirmed by the Appellate Division of the Supreme Court of the State of New York, and on April 3, 1979 the Court of Appeals of the State of New York denied Connelly's motion for leave to appeal. Motions for leave to reargue, addressed to both of these courts, were also denied. This Petition followed.

## **REASONS FOR DENYING THE WRIT**

### **THE GRANT OF SUMMARY JUDGMENT DID NOT DENY PETITIONER ANY SEVENTH AMENDMENT RIGHT TO A JURY TRIAL OR ANY FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

Petitioner does not make clear the basis for the Petition. It appears, however, that he is claiming that the grant of summary judgment denied him the right to a plenary trial (Pet. 38-41). Thus, petitioner would appear to be arguing that either his seventh amendment right to a jury trial, or his fourteenth amendment right to due process, was infringed.

The seventh amendment right to a jury trial does not, however, apply to cases brought in state courts. *E.g., Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211, 217 (1916); *Wartman v. Branch 7, Civil Division, County Court*, 510 F.2d 130, 134 (7th Cir. 1975). Equally unavailing is any due process argument. The due process clause only entitles a litigant to reasonable notice and the opportunity for a fair hearing; it does not mandate any particular form of procedure. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974). Thus, the procedural device of summary judgment does not infringe any due process rights. *Fidelity and Deposit Co. v. United States*, 187 U.S. 315 (1902); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974). Nor does irregularity and error, misconstruction of a state statute, or even fraud by an opponent, constitute a violation of due process. *Patterson v. Colorado*, 205 U.S. 454, 461 (1907); *Corry v. Campbell*, 154 U.S. 629 (1878); *Marrow v. Brinkley*, 129 U.S. 178, 181 (1889); *Thomson v. Butler*, 136 F.2d 644, 647-48 (8th Cir. 1943).

In the instant case, petitioner had more than reasonable opportunity to have his captious arguments considered by fair and impartial tribunals. Petitioner's arguments

were first considered and rejected on CTC's summary judgment motion; his arguments were then further considered and rejected on three subsequent motions attacking the decision granting CTC summary judgment; and his arguments were yet again twice considered and rejected by five Justices of the Appellate Division of the Supreme Court of the State of New York and twice considered and rejected by seven Judges of the Court of Appeals of the State of New York. At every stage of this proceeding, petitioner's arguments were carefully examined, and rejected as totally devoid of merit. If ever due process was afforded to a litigant, it was afforded to petitioner.

## **CONCLUSION**

**For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.**

New York, New York  
August 24, 1979

Respectfully submitted,

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